FOR REFERENCE USE IN
THE LIBRARY ONLY.

LEEDS POLYTECHNIC
LIBRARY

FOR REFERENCE USE IN
THE LIBRARY ONLY.

FOR REFERENCE USE IN
THE LIBRARY ONLY.

LEEDS BECKETT UNIVERSITY
LIBRARY
DISCARDED
TELEPEN
71 0276998 8

THE LAW REPORTS

23 Chancery Division

ISBN 0 406 09108 0

This compilation

© The Incorporated Council of Law Reporting
for England and Wales
and
Butterworth & Co. (Publishers) Ltd.
1973

Reprinted by photolitho in Great Britain by
Compton Printing Ltd., London and Aylesbury

This Reprint of
THE LAW REPORTS
is published in collaboration with
THE INCORPORATED COUNCIL OF LAW REPORTING
FOR ENGLAND AND WALES
by
BUTTERWORTH & CO. (PUBLISHERS) LTD.
88 KINGSWAY
LONDON WC2B 6AB

NOTE. This Reprint is a photographic reproduction of the original volume apart from the Tables of Cases, Statutes and Statutory Instruments and the Subject Index, which are omitted in view of the facilities provided by modern text books and other works of reference

THE

LAW REPORTS.

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

BANKRUPTCY AND LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—G. W. HEMMING, Q.C.

REPORTERS.

Court of Appeal	H. CADMAN JONES, MARTIN WARE, W. LLOYD CABELL,	*Barristers-at-Law.*
V.-C. Bacon	J. B. DAVIDSON, F. G. A. WILLIAMS,	*Barristers-at-Law.*
Mr. Justice Fry	W. LLOYD CABELL, CHALONER W. CHUTE,	*Barristers-at-Law.*
Mr. Justice Kay	T. F. MORSE, W. WORSLEY KNOX,	*Barristers-at-Law.*
Mr. Justice Chitty	G. I. FOSTER COOKE, GEORGE MURRAY,	*Barristers-at-Law.*
Mr. Justice Pearson	T. W. GUNNING, CHARLES MARETT,	*Barristers-at-Law.*
C. J. Bacon	J. B. DAVIDSON, F. G. A. WILLIAMS,	*Barristers-at-Law.*

VOL. XXIII.

1883.—XLVI. and XLVII. VICTORIÆ.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET; AND 14, CHARING CROSS.
PUBLISHING OFFICE, 27, FLEET STREET, E.C.

1883.

710 - 276998
LEEDS POLYTECHNIC
19106/1
SV
37754
- 4 SEP 1973
5344.420
LEEDS BECKETT UNIVERSITY
DISCARDED

Lord Selborne,	*Lord Chancellor.*
Sir George Jessel,	*Master of the Rolls.*
Sir Richard Baggallay,	*Lords Justices of the Court of Appeal.*
Sir William Baliol Brett,	
Sir Henry Cotton,	
Sir Nathaniel Lindley,	
Sir C. S. C. Bowen,	
Sir Edward Fry,	
Sir James Bacon,	*Vice-Chancellor.*
Sir Edward Fry,	*Justices of High Court, attached to Chancery Division.*
Sir E. E. Kay,	
Sir J. W. Chitty,	
Sir John Pearson,	
Sir James Bacon,	*Chief Judge in Bankruptcy.*
Sir Henry James,	*Attorney-General.*
Sir F. Herschell,	*Solicitor-General.*

ERRATUM.

Page	*Line*	*For*	*Read*
339	13	*E. S. Ford*	*Edward Ford.*

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1883, will be as follows:—

In the First Series,
22 Ch. D.

In the Second Series,
10 Q. B. D. 8 P. D.

In the Third Series,
8 App. Cas.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

PAGE

Adam's Policy Trusts, *In re* – 525
Alcock, *In re.* Prescott *v.* Phipps 372
Alexandra Palace Company, *In re* – – – – – 297
Angas *v.* McLachlan – – 330
Aston, *In re* – – – – 217
Attorney-General *v.* Bermondsey (Vestry of) – – – 60

B.

Bailey, Pinnock *v.* – – – 497
Balfour *v.* Cooper – – – 472
Basham, *In re.* Hannay *v.* Basham – – – – – 195
———, Hannay *v.* *In re* Basham – – – – – 195
Bermondsey (Vestry of), Attorney-General *v.* – – – 60
Bird, *In re.* *Ex parte* Hill – 695
——, Lydney and Wigpool Iron Ore Company *v.* – – – 358
Blaiberg, *Ex parte.* *In re* Toomer 254
Blaksley's Trusts, *In re* – – 549
Blight *v.* Hartnoll – – – 218
Bockwoldt, Peruvian Guano Company *v.* – – – 225
Boswell *v.* Coaks – – – 302
Boughton, *In re.* Boughton *v.* Boughton – – – – 169
——— *v.* Boughton. *In re* Boughton – – – – 169
Bretnall, Warwicker *v.* – – 188
Brooks, *Ex parte.* *In re* Fowler 261
Brown, *In re.* Ward *v.* Morse – 377
Bushell, *In re.* *Ex parte* Izard (No. 1) – – – – 75
———, *In re.* *Ex parte* Izard (No. 2) – – – – 115
Byron's Charity, *In re* – – 171

C.

PAGE

Carriage Co-operative Supply Association, *In re. Ex parte* Clemence – – – – 154
Chapple. *In re. Ex parte* Izard 409
Charles *v.* Finchley Local Board 767
Clark, Eastwood *v. In re* Gadd 134
Clemence, *Ex parte. In re* Carriage Co-operative Supply Association – – – – 154
Coaks, Boswell *v.* – – – 302
Cooper, Balfour *v.* – – – 472
Cooper Hall & Co., Fraser *v.* Waddell *v.* Fraser – – 685
Coote *v.* Judd – – – 727
Coxwell, Wilson *v.* – – – 764

D.

Darlow, Hickson *v.* – – 690
Draeger, Hawes *v.* – – – 173
Drakes, Robinson *v.* – – 98
Dronfield Silkstone Coal Company (No. 2), *In re* – – 511
Dumble, *In re.* Williams *v.* Murrell – – – – – 360
Dutton *v.* Thompson – – 278

E.

Eastwood *v.* Clark. *In re* Gadd 134
Engelhardt, *Ex parte. In re* Engelhardt – – – – 706
Exmouth (Viscount), *In re.* Viscount Exmouth *v.* Praed – 158
———————— *v.* Praed. *In re* Viscount Exmouth – 158

F.

Faulkner, Godfrey *v. In re* Godfrey – – – – – 483
Finch, *In re.* Finch *v.* Finch – 267
——— *v.* Finch. *In re* Finch – 267
Finchley Local Board, Charles *v.* 767
Follett *v.* Pettman – – – 337
Fowler, *In re. Ex parte* Brooks 261
Frank Mills Mining Company, *In re* – – – – – 52
Fraser *v.* Cooper Hall & Co. Waddell *v.* Fraser – – 685
Fraser, Waddell *v.* Fraser *v.* Cooper Hall & Co. – – 685
French, Leslie *v. In re* Leslie – 552

G.

Gadd, *In re.* Eastwood *v.* Clark 134
Gloag and Miller's Contract, *In re* – – – – – 320
Godfrey, *In re.* Godfrey *v.* Faulkner – – – – 483
——— *v.* Faulkner. *In re* Godfrey – – – – – 483
Godfrey's Trust, *In re* – – 205
Gold Hill Mines, *In re* – – 210
Graham *v.* Massey. *In re* Hawthorne – – – – 743
Great Eastern Railway Company, Kensit *v.* – – – 566
Greaves' Settlement Trusts, *In re* – – – – – 313
Green *v.* Humphreys – – 207
Griffith, *Ex parte. In re* Wilcoxon – – – – 69
Guardian Benefit Building Society, *In re* – – – 440

H.

Hack *v.* London Provident Building Society – – 103
Hall, *Ex parte. In re* Wood – 644
Hampson, Imperial Hydropathic Hotel Company, Blackpool *v.* 1
Hannay *v.* Basham. *In re* Basham – – – – 195
Harben *v.* Phillips – – – 14
Hartnoll, Blight *v.* – – 218
Hauxwell, *Ex parte. In re* Hemingway – – – – 626
Hawes *v.* Draeger – – – 173
Hawthorne, *In re.* Graham *v.* Massey – – – – 743
Heatly, Quilter *v.* – – – 42
Hemingway, *In re. Ex parte* Hauxwell – – – – 626
Hickson *v.* Darlow – – – 690
Hill, *Ex parte. In re* Bird – 695
Humphreys, Green *v.* – – 207
Hutton *v.* West Cork Railway Company – – – – 654

I.

PAGE

Imperial Hydropathic Hotel Company, Blackpool *v.* Hampson – – – – – 1
Ince Hall Rolling Mills Company, *In re* – – 545, n.
Izard, *Ex parte*. *In re* Bushell (No. 1) – – – – 75
——, *Ex parte*. *In re* Bushell (No. 2) – – – – 115
——, *Ex parte*. *In re* Chapple 409

J.

Jackson, Wallis *v.* – – – 204
Jakeman's Trusts, *In re* – – 344
Judd, Coote *v.* – – – 727

K.

Kennedy *v.* Lyell – – – 387
Kensit *v.* Great Eastern Railway Company – – – – 566
King *v.* Lucas – – – 712

L.

Lancaster, Mostyn *v.* Taylor *v.* Mostyn – – – – 583
Lee (a Person of unsound Mind), *In re* – – – – – 216
Leslie, *In re* Leslie *v.* French – 552
—— *v.* French. *In re* Leslie – 552
Lister's Petition. Milford Docks Company, *In re* – – – 292
London Provident Building Society, Hack *v.* – – – 103
Lucas, King *v.* – – – 712
Lydney and Wigpool Iron Ore Company *v.* Bird – – 358
Lyell, Kennedy *v.* – – – 387

M.

Mackenzie's Trusts, *In re* – 750
McLachlan, Angas *v.* – – 330
Madras Irrigation and Canal Company, *In re*. Wood *v.* Madras Irrigation and Canal Company – – – – 248
——————, Wood *v.* *In re* Madras Irrigation and Canal Company – – 248
Massey, Graham *v.* *In re* Hawthorne – – – – 743
Mello, Widgen *v.* *In re* Webster's Estate – – – 737
Milford Docks Company, *In re*. Lister's Petition – – – 292
Morse, Ward *v.* *In re* Brown – 377
Mostyn *v.* Lancaster. Taylor *v.* Mostyn – – – – 583
——, Taylor *v.* Mostyn *v.* Lancaster – – – – 583
Mundy *v.* Rutland (Duke of) – 81
Murch, West of England and South Wales District Bank *v.* 138
Murrell, Williams *v.* *In re* Dumble – – – – 360

N.

Newton's Trusts, *In re* – – 181

O.

Ommanney, Robinson *v.* – – 285

P.

Payne, *In re*. Randle *v.* Payne 288
——, Randle *v.* *In re* Payne 288
Penrice *v.* Williams – – 353
Peruvian Guano Company *v.* Bockwoldt – – – – 225
Pettman, Follett *v.* – – 337
Phillips' (William) Insurance, *In re* – – – – 235
Phillips, Harben *v.* – – 14
Phipps, Prescott *v.* *In re* Alcock 372
Photographic Artists' Co-operative Supply Association, *In re* 370
Pink, *In re* – – – – 577
Pinnock *v.* Bailey – – – 497
Plaskynaston Tube Company, *In re* – – – – – 542
Praed, Exmouth (Viscount) *v.* *In re* Viscount Exmouth – 158
Prescott *v.* Phipps. *In re* Alcock 372

Q.

Quilter *v.* Heatly – – – 42

R.

	PAGE
Randle *v.* Payne. *In re* Payne	288
Robinson *v.* Drakes – –	98
——— *v.* Ommanney – –	285
Rutland (Duke of), Mundy *v.* –	81

S.

	PAGE
Scottish Petroleum Company, *In re* – – – – – –	413
Somerville, *Ex parte*. *In re* South Eastern Railway Company – – – – – –	167
South Eastern Railway Company, *In re*. *Ex parte* Somerville – – – – –	167

T.

	PAGE
Taylor *v.* Mostyn. Mostyn *v.* Lancaster – – – –	583
Thompson, Dutton *v.* – –	278
Toomer, *In re*. *Ex parte* Blaiberg – – – – –	254
Tootal's Trusts, *In re* – –	532
Townsend *v.* Townsend – –	100

W.

	PAGE
Waddell *v.* Fraser. Fraser *v.* Cooper Hall & Co. – –	685
Walker, Wheelwright *v.* – –	752
Wallis *v.* Jackson – – –	204
Ward *v.* Morse. *In re* Brown –	377
Warwicker *v.* Bretnall – –	188
Watson Kipling & Co., *In re* –	500
Webster's Estate, *In re*. Widgen *v.* Mello – – –	737
West Cork Railway Company, Hutton *v.* – – – –	654
West of England and South Wales District Bank *v.* Murch	138
Wheelwright *v.* Walker – –	752
Widgen *v.* Mello. *In re* Webster's Estate – – –	737
Wilcoxon, *In re*. *Ex parte* Griffith	69
Willey, *Ex parte*. *In re* Wright	118
Williams *v.* Murrell. *In re* Dumble – – – – –	360
———, Penrice *v.* – –	353
Wilson *v.* Coxwell – – –	764
Wood, *In re*. *Ex parte* Hall –	644
——— *v.* Madras Irrigation and Canal Company. *In re* Madras Irrigation and Canal Company	248
Wright, *In re*. *Ex parte* Willey	118

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

BANKRUPTCY AND LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

IMPERIAL HYDROPATHIC HOTEL COMPANY, BLACKPOOL *v.* HAMPSON.

C. A.
1882
Dec. 13, 15.

[1882 I. 3676.]

Company—Dismissal of Directors—Power of General Meeting—Alteration of Articles—Costs out of Company's Funds.

A joint stock company whose directors are appointed for a definite period has no inherent power to remove them before the expiration of that period.

If the articles of association of a company contain no power to remove directors before the expiration of their period of office, but authorize the shareholders by special resolution to alter any of the articles, there must be a separate special resolution altering the articles so as to give power to remove directors before a resolution can be passed to remove any of them.

Certain shareholders who were appointed directors by a general meeting in the place of the existing directors, brought an action in the name of the company against the existing directors to restrain them from acting. The Court held that the new directors were not duly appointed, and refused the relief prayed with costs; but inasmuch as the Plaintiffs substantially represented the wishes of the majority of the shareholders, although technically they had no right to use the name of the company, the Court allowed the costs to be paid out of the company's assets.

THIS was an appeal from an order made by Mr. *Bristowe*, the Vice-Chancellor of the Duchy of *Lancaster*, on the 31st of October, 1882, dismissing a motion for an injunction restraining the Defendant, *J. R. Hampson*, from voting or acting as a director of

C. A. 1882

IMPERIAL HYDROPATHIC HOTEL COMPANY, BLACKPOOL v. HAMPSON.

the company, and restraining all the Defendants from proceeding upon certain resolutions passed at a meeting of directors on the 11th of October, 1882, and from acting in contravention of resolutions passed at meetings of the Plaintiff company held on the 28th of August, 1882, and the 27th of September, 1882, and from excluding the Plaintiffs *James Lighbown* and *E. Rogerson* from the meetings of the directors.

The *Imperial Hotel Company, Blackpool* (*Limited*), was registered on the 9th of June, 1873. It was re-registered on the 12th of November, 1877, with fresh articles of association.

In 1881, the name of the company was changed to the *Imperial Hydropathic Hotel Company, Blackpool* (*Limited*), a new body of shareholders were admitted, and a deed of agreement dated the 29th of March, 1881, was executed by the old and new shareholders as to certain matters affecting the company.

The articles of association contained among others the following provisions :—

Art. 1. That the regulations in Table A of the *Companies Act*, 1862, should not apply to the company, except such as were embodied in the articles.

Art. 2. That a general meeting should mean any meeting of the shareholders duly convened and constituted pursuant to the articles, whether an ordinary or extraordinary meeting. That the expression "special resolution" should mean a special resolution of the company according to the 51st section of the *Companies Act*, 1862.

Art. 40. That the directors might whenever they thought fit, and they should upon a requisition made in writing by any number of shareholders holding in the aggregate not less than one-third part of the shares of the company then taken up, convene an extraordinary general meeting.

Art. 43. If they did not proceed to convene the same within fourteen days from the date of the requisition, the requisitionists or any other shareholders holding the required number of shares might themselves convene an extraordinary general meeting.

Art. 44. That the company might from time to time by a resolution passed by at least three-fourths of the votes of the shareholders present personally or by proxy at any extraordinary

meeting, repeal, alter, or add to any regulations of the company, whether contained in the articles of association or not, provided that such resolution be confined to the object or business specified in the notice convening the meeting.

Art. 45. That seven days' notice at least should be given of any special meeting, specifying the place and the time of meeting, and the purpose for which it was to be held.

Art. 46. That any shareholder might on giving not less than three days' previous notice submit any resolution to a meeting beyond the matters contained in the notice given of such meeting.

Art. 47 required that the notice should be left at the registered office of the company.

Art. 64. That the number of directors should not be less than seven, and the qualification of every director should be the holding in his own right registered shares or stock to the nominal value of £500.

Art. 65. That the first directors should be appointed at the first general meeting of the company, and in the meantime the subscribers to the articles should act as directors.

Art. 72. That at the second ordinary meeting after the incorporation of the company, and the ordinary meeting in any subsequent year, one-third of the directors for the time being, or if their number should not be a multiple of three, then the nearest to one-third, should retire from office.

Art. 75. That the company at the general meeting at which any directors retire in manner aforesaid should fill up the vacated offices by electing a like number of persons.

Art. 77. That any casual vacancy in the board of directors might be filled up by the directors, but any person so chosen should retain his office so long only as the vacating director would have retained the same if no vacancy had occurred.

On the 24th of July, 1882, Mr. *Batty*, a shareholder and creditor of the company, filed a petition to wind up the company on the alleged ground of insolvency. At that time the directors were Messrs. *Hampson*, *Lyddock*, *Booth*, *Byshe*, *Thompson*, and *Fish*.

On the 27th of July, 1882, the board of directors met and

C. A. 1882 — IMPERIAL HYDROPATHIC HOTEL COMPANY, BLACKPOOL v. HAMPSON.

removed Mr. *Matthew* from the office of secretary of the company and appointed Mr. *Gregson* in his place.

The petition was heard on the 5th of August, 1882, when the Vice-Chancellor made an order directing that a meeting should be convened in order to enable the shareholders to decide whether they would take steps to raise the question whether the debts claimed by the Petitioner and others in the same position with him could be enforced against the company.

A special general meeting was accordingly held on the 28th of August, 1882, when the following resolutions were passed:—

1. That steps be taken to raise the question whether the debt claimed by Mr. *Batty* and others can be enforced against the company.

2. That a committee (whose names were given) should be appointed for that purpose.

3. That the proceedings which had been taken in the name of the company to compromise the petition for winding up the company were not authorized, and were not for the benefit of the company.

The chairman then left the chair, and declared the meeting at an end, but a new chairman was elected and certain additional resolutions were passed, of which notice had been previously given by those who proposed them under art. 46.

The principal of these additional resolutions were as follows:—

8. That Messrs. *Hampson* and *Lyddock* be removed from the office of director, and that two others be elected in their place.

9. That Messrs. *Rogerson* and *Lighbown* be elected in the place of Messrs. *Hampson* and *Lyddock*.

On the 27th of September, 1882, an extraordinary meeting was held for the purpose of confirming the resolutions passed at the meeting of the 28th of August, 1882, and all the resolutions passed at the previous meeting were confirmed.

Some of the old directors refused to acknowledge the validity of the 8th and 9th resolutions, and eventually, on the 20th of October, 1882, the present action was commenced by the company, and Messrs. *Fish*, *Lighbown*, and *Rogerson*, against Mr. *Hampson* and others, claiming specific performance of the agreement of the 29th of March, 1881, and a declaration that *Hampson* was no

longer a director of the company, and an injunction restraining the Defendants from excluding the Plaintiffs *Rogerson* and *Lighbown* from the meetings of the directors.

On the 31st of October, 1882, the Plaintiffs moved for an injunction before the Vice-Chancellor of the Duchy.

The Vice-Chancellor dismissed the motion with costs; and on the same day he also dismissed the petition for winding-up.

The Petitioner appealed from the order dismissing the petition, and the Court of Appeal on the 13th of December, 1882, dissolved the order of the Vice-Chancellor, and ordered that the company should pay the Petitioner's debt within a month, and in default, the order for winding-up was to be made.

The Plaintiffs now appealed from the order dismissing the motion for an injunction.

Marten, Q.C., and *H. B. Buckley*, for the Appellants:—

The resolution removing the directors was valid, for art. 44 gives power to an extraordinary general meeting to vary the articles. There is no reason why the articles should not be altered and new directors appointed in pursuance of the new power, by the same resolution. If not, we say that the company has an inherent power to remove directors under the general law. They are servants of the company, and if wrongfully dismissed they may have an action for wrongful dismissal. The *Companies Clauses Act*, 1845, s. 91, assumes that there is a power of doing it. That section does not purport to confer a power, but assumes its existence and puts a limitation on its exercise. It was assumed in *Hattersley* v. *Earl Shelburne* (1) that the power existed, and it has never been held that any officer of a company can insist on retaining his office against the will of the company. It would be most inconvenient so to hold, for directors without going beyond the limits of their powers can do great injury to the company if there is no power to remove them. A director who, as in the present case, refuses to give effect to the resolutions of the company in general meeting ought to retire, and if he will not retire he should be dismissed. The case is not like one of dismissal at pleasure: *Alison's Case* (2).

(1) 31 L. J. (Ch.) 873. (2) Law Rep. 9 Ch. 1.

C. A. 1882

IMPERIAL HYDROPATHIC HOTEL COMPANY, BLACKPOOL v. HAMPSON.

The Plaintiffs have a right to use the name of the company: they represent the majority of the shareholders, and if unsuccessful they ought to have the costs out of the company's assets.

Rigby, Q.C., and *Pankhurst*, for the Defendants, were not called on, except as to the costs.

JESSEL, M.R.:—

The appeal in this case is brought against an order of Vice-Chancellor *Bristowe*, and it certainly raises a new question, namely, whether without express statutory authority a company can in general meeting remove its directors. That is the chief question argued. Now when we consider the nature of these companies we find that they are statutory corporations, created under the *Companies Act*, 1862, section 18 of which says that the subscribers to the memorandum and the other members shall on registration be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of an incorporated company. I find no other power given to them by express words as regards their proceedings, except under the 50th section, which gives them the power of altering their regulations by special resolutions. They also have the power if they think fit, but not otherwise, of adopting the rules contained in Schedule A. to the Act of Parliament. There is one section of those regulations which it is material to consider, because it has a bearing on the general terms of the Act of Parliament. It is art. 65 of Table A.: "The company in general meeting may by a special resolution remove any director before the expiration of his period of office, and may by an ordinary resolution appoint another person in his stead; the person so appointed shall hold office during such time only as the director in whose place he is appointed would have held the same if he had not been removed." So that it is plain that the enactors of this Act of Parliament did not imagine that there was an express power to remove in the Act of Parliament itself, otherwise this would have been entirely superfluous.

The fact of the company being a corporation is not quite conclusive of the question: because it may well be that either from

the nature of the corporation itself or by reason of a special provision you ought to infer this power. I will consider both points. First of all, is there any necessity? I think not. If the regulations of the company either prohibit the removal of the director or contain no provision like that in Table A. for the removal of the director, you can insert such a provision in the articles of association by special resolution under sect. 50. Therefore, whenever the occasion arises that you require to remove a director without special cause shewn, you cannot accomplish that object except under that power in the articles of association, and if you have given yourselves the power of removing the director, then you can proceed to exercise that power by an act of removal. Therefore, that appears to me to be a strong argument against the incidental power of removal. The only other question is whether the power is inherent in a corporation—it is quite plain to me it is not incidental to a corporation. As regards the corporators themselves it has been decided that in ordinary corporations there is a power of removal from the corporation for good cause. From the nature of the case one would assume that. Take the case of a municipal corporation—a corporation for the government of a town—if the head of a corporation became incapable of carrying on his functions it would be unreasonable to assume that there was no inherent power in the corporation to remove him and appoint some one else in his stead. So in the same way you might make by-laws that whenever a corporator was incapable of exercising his functions either from personal incapacity, or because he had become infamous or otherwise unfit, he might be removed from the corporation; but all that is a necessary incident for carrying out the purposes for which the corporation is created, and it stands on a totally different footing from removing a person from an office in the corporation. It appears to me there is no doctrine of the Common Law, and there is no statutory provision which enables you to vary the contract entered into between the members that the directors shall hold office for a given period, supposing there is a contract which does not contain the power of removal. That special power not being there, I think that disposes of the notion that you can remove by some inherent power not contained in the statute or the articles.

C. A.
1882
IMPERIAL HYDROPATHIC HOTEL COMPANY, BLACKPOOL v. HAMPSON.
Jessel, M.R.

Now, as regards the other point, I think there can be no doubt whatever. The directors are to be elected in the ordinary way, to hold office for a certain period, obviously until they retire. There are provisions for the retirement in the ordinary way, and of course the meaning of the articles is that until the retirement they hold office and continue to hold office. Therefore, it comes to this, that the directors once elected hold office during the period for which they are elected without any power of removal.

The only other argument addressed to us is this:—It is said that under the special terms of these articles of association you can remove the directors; and for that purpose it is therefore necessary to see what the special terms are. The 44th clause is relied on: "The company may from time to time by a resolution passed by at least three-fourths of the votes of the shareholders present personally or by proxy at any extraordinary meeting, repeal, alter, or add to any of the regulations of the company, whether contained in the articles of association or not, provided that such resolution be confined to the object or business specified in the notice convening the meeting." Then the 45th clause requires seven days' notice at least, "specifying the place, the time, the hour of meeting, and the purpose for which any general meeting is to be held." Then clause 46: "Any shareholder may, on giving not less than three days' previous notice, submit any resolution to a meeting beyond the matters contained in the notice given of such meeting," which is to be left under the 47th at the registered office of the company.

Now, that being the position of matters, it is suggested that under clause 44 the company can by resolution remove two directors. In my opinion they cannot. They can only alter the articles of association. On the contrary, by the resolution which was passed, they left the articles alone. The articles remained, prescribing the whole term of office, three years, or whatever it might be. They have not altered them in the least, but they have passed a simple resolution that two specially named directors shall be removed from office. In my opinion that is not in the purview of clause 44 at all. If they wanted to act under clause 44 they should have had passed a clause enabling the company to remove the directors, and then when they had conferred on them-

selves that power they might have acted upon it. That, I think, disposes of the whole matter.

But it was suggested that three days' notice given of a resolution by a shareholder would do instead of the notice specified in clause 45. In my opinion it would not. The notice given by clause 45 is to be given to every shareholder. The notice given by clause 46 is only to be left at the registered office of the company, the one notice is seven days' notice, and the other is three days' notice. It is plain to me that the notice to be given under clause 46 is something ancillary or subsidiary, which could be properly brought forward under the terms of the notice convening the meeting, and therefore the resolution passed at the first meeting was passed on a bad notice. As regards the second meeting it is not necessary to decide whether the second meeting had power to remove directors. The result, therefore, will be that this appeal will be dismissed with costs.

As regards the question of costs it stands in this way:—There is no doubt that the directors had arranged, and according to our previous decision properly arranged, to pay the debt of Mr. *Batty*, but the Vice-Chancellor had the power of consulting the company as to whether the company desired to oppose Mr. *Batty's* claim, and he directed the company to meet and consider it. A general meeting was accordingly summoned in pursuance of the terms of the 91st section of the Act of Parliament, and the company in general meeting decided on opposing the claim. The company went further and appointed a certain number of people to oppose it, and gave them certain directions; but the holding of the meeting was in accordance with the desire of the Vice-Chancellor to ascertain what the wishes of the company were. That being so, and the company having appeared, though not technically, substantially by these shareholders, it is for us in the exercise of our discretion to decide whether it is reasonable to allow the costs of their so doing out of the funds of the company. Now it does appear to be not unreasonable, but right so to do, as it was the company's opposition—not technically, but really and substantially—the act of the majority of the company, and it appears to me that it would not be fair to throw the costs of that opposition on these shareholders personally, who really acted throughout

C. A. 1882 IMPERIAL HYDROPATHIC HOTEL COMPANY, BLACKPOOL v. HAMPSON.

simply as the delegates and representatives of the company. For those reasons I think that if the company pay the debt which it is ordered to pay to Mr. *Batty*, the costs should be paid out of the company's funds. Of course the company's own costs will come out of the company's funds in the same way. If the debt is not paid, and the matter should go to a winding-up, the costs of both parties should come out of the company's assets.

COTTON, L.J. :—

In this case, in my opinion, it is not necessary to express any opinion whether a corporation has any inherent power to remove directors when there is nothing like, as there is in the present case, a contract between all the members of the corporation as to the appointment and duration of the office of the directors. In the present case there is not only the charter of incorporation, and the memorandum, but there are the articles of association, which under the Act are a contract between all the shareholders to comply with the regulations in them, and we find in the articles provisions as to the appointment of directors, and the rotation of directors, that they are to go out at a certain period; that in my opinion is a contract that those who may be duly appointed by the shareholders to be directors shall continue in the office till under the rotation they are to go out, or until they are to go out under the other provisions of those articles as to disqualification or otherwise. Therefore it becomes not a question, though raised so here, as regards the right of the directors, but it is a question of the right of the shareholders *inter se* to pass any such resolution as has been attempted to be passed in this case. If, as I think there is, there is a contract between all the shareholders as regards the directors, then it is a question whether a majority at a general meeting can bind those who are not there, and take no part in it—whether this is one of the matters as regards which the majority at the meeting has power to bind the absent and has power to bind those who are found, on the investigation being made, to dissent. It is the right of the shareholders not acquiescing in the removal of the directors which is in question, because on that depends whether the resolution to remove them is or is not a valid resolution; and therefore, we have really to

consider whether in the present case the contract between these shareholders has been followed. There is nothing in the Act or in the articles which directly enables a general meeting to remove directors; but the way it is put is this—that there is power in these articles, as there is power in the Act, by a meeting duly called to pass a resolution altering the articles; and it is said that here there was a resolution which would have been effectual to alter the articles that these directors whom the articles did not authorize to be removed should be removed. Now in my opinion it is an entire fallacy to say that because there is power to alter the regulations, you can by a resolution which might alter the regulations, do that which is contrary to the regulations as they stand in a particular and individual case. It is in no way altering the regulations. The alteration of the regulations would be by introducing a provision, not that some particular director be discharged from being a director, but that directors be capable of being removed by the vote of a general meeting. It is a very different thing to pass a general rule applicable to every one who comes within it, and to pass a resolution against a particular individual, which would be a *privilegium* and not a law. Now here there was no attempt to pass any resolution at this meeting which would affect any director, except those who are aimed at by the resolution, no alteration of the regulations was to bind the company to those regulations as altered; and assuming, as I do for the present purpose, as the second meeting seems to have been regular according to the notice, that everything was regularly done, what was done cannot be treated in my opinion as an alteration first of the regulations, and then under that altered regulation as a removal of the directors. But it would be evidently most unreasonable to say that in such a case all these shareholders are not to have notice that this is an alteration in the regulations, but are simply to be told the object is to remove those whose policy is objected to. The case referred to, *Alison's Case* (1), was entirely different. The principle laid down in that case was confined by the Judges who decided it to cases where the resolution is one that necessarily involves the alteration of the constitution and regulations of the company. In that case under the articles

(1) Law Rep. 9 Ch. 1.

C. A. 1882 IMPERIAL HYDROPATHIC HOTEL COMPANY, BLACKPOOL v. HAMPSON. Cotton, L.J.

there was power given by the Act of Parliament to add to the capital, and when there was a resolution that the directors should issue additional capital for a particular purpose that necessarily involved the alteration of the memorandum by providing that the capital should be its original capital plus this new capital. That is entirely different from such a case as the present, where there is not a general alteration of the regulations of the company, but simply an attempt, without altering the rules for the purpose, to remove a director, his removal being, unless there is a general alteration, an illegal act on the part of those who attempt to remove him—by illegal I mean an act *ultrà vires* and not supported by any regulation of the company. Therefore, I think that the appeal ought to be dismissed with costs.

I agree with the Master of the Rolls as to what ought to be done as to the costs of the appearance on the winding-up petition.

BOWEN, L.J.:—

I am of the same opinion, and I wish to add only a few words about the general question of removal, because it seems to me the ingenuity of counsel for the Appellants has succeeded perhaps in introducing into the argument some sort of confusion. I should wish in the first instance to begin by remarking this, that when persons who are directors of a company are from time to time spoken of by Judges as agents, trustees, or managing partners of the company, it is essential to recollect that such expressions are used not as exhaustive of the powers or responsibilities of those persons, but only as indicating useful points of view from which they may for the moment and for the particular purpose be considered—points of view at which they seem for the moment to be either cutting the circle or falling within the category of the suggested kind. It is not meant that they belong to the category, but that it is useful for the purpose of the moment to observe that they fall *pro tanto* within the principles which govern that particular class.

Having said that with a view to clear the ground, I now come to the immediate question of removal of directors. These directors are not exactly agents nor exactly servants—perhaps not servants at all—nor exactly trustees, nor exactly managing

partners, if by that is meant that they are nothing more and nothing less. They are persons invested with strictly defined powers of management under the articles of association of a statutory corporation. In order to consider what the powers of removal are on the part of such a corporation it stands to reason that one must look at the statutes and the articles of association. A good deal has been said about the powers incident to a common law corporation to remove. I begin by asking to remove whom? Are we talking of freehold officers of a corporation at common law, or are we talking simply of agents of a statutory corporation? All the questions about removal of the officers of a common law corporation are beside the point. This is not a common law corporation, the case of a freehold officer of a common law corporation, nor is it a question of amotion at all. As regards agents of a corporation at common law they are exactly, as it seems to me, in the position of agents of any other individual, except that their master is a corporate body and not an individual. When you come to consider how the corporation is limited by its own duties and responsibilities towards its corporate members, then possibly difficulties may arise. But I put them all aside for a moment by observing that this is neither a common law corporation, nor is it a question of removal of corporate members of a common law corporation. It is neither a question of removal of an officer nor of an agent of a common law corporation. We are discussing the rights of directors of a statutory corporation created by the Act of 1862, and in such a case we must consider what are the rights of the directors and shareholders, for the articles of association, by sect. 16, are to bind all the company and all the shareholders as much as if they had all put their seals to them. Therefore you must look, when you are considering the question of dismissal of a director, to see whether the articles of association have been complied with. When we look at the articles of association it seems quite clear that they are not complied with. It seems to me that as regards the first meeting the Appellants are out of Court, and as regards the second meeting the vice of their position is this, that they are treating what has been done at this meeting as if it amounted to an alteration of the regulations, whereas it is only a displacement of individuals.

C. A.
1882
IMPERIAL HYDROPATHIC HOTEL COMPANY, BLACKPOOL v. HAMPSON.

I do not think it is possible to find language that would more happily express my view than that of Lord Justice *Cotton*. It is a mistake to suppose that a law and a *privilegium* are the same, or that you are really altering the regulations when you are attempting to deprive an individual of the benefit of them.

Solicitors: *Pritchard, Englefield, & Co.*, agents for *Storer & Lloyd, Manchester; T. Crowther.*

M. W.

C. A.
1882
CHITTY, J.
Dec. 1, 2.
C. A.
Dec. 5, 6.
1883
March 7.

HARBEN *v.* PHILLIPS.

[1882 H. 5055.]

Company—Proxies—General Meeting.

By the 65th of the articles of association of a steam-ship company, it was provided that votes might be given personally or by proxy. Article 66 provided that the instrument appointing a proxy should be in writing under the hand of the appointor, and should be attested by one or more witness or witnesses, and that no person should be appointed a proxy who was not a member of the company. Article 68 gave a form of proxy containing an attestation clause. By a special resolution, article 68 was repealed, and a new form given without an attestation clause, but the resolution did not purport to repeal art. 66:—

Held, by *Chitty*, J., and by the Court of Appeal, that as the special resolution did not purport to affect art. 66, the provision requiring the signature to be attested remained in force, and that it was not merely directory, but that attestation was essential to the validity of a proxy, and that unattested proxies must be rejected.

Disputes arose as to the number of directors to be appointed, as to the change of the port of the company, and as to the amount of dividend to be declared. There having been seven directors, five of whom remained in office, a poll was taken to determine whether *M.* and *T.* should be elected, and the number of directors continued at seven, or whether the five Plaintiffs should be elected, and the number of directors increased to ten. A poll was also taken on the question whether the dividend proposed by the old directors should be paid or a larger dividend which had been proposed by persons who sided with the Plaintiffs. A poll was also taken on the question whether the port should be changed or should remain where it was. In each case the result of the poll was in favour of the first alternative if unattested proxies were admitted, but for the second, if they were excluded. The chairman in each case held the proxies admissible. The five old directors and *M.* and *T.* accordingly claimed to be the board of directors, and excluded the Plaintiffs. The Plaintiffs thereupon

commenced their action on behalf of themselves and all other the shareholders except the Defendants, making the company a co-Plaintiff, against the seven to restrain them from paying any dividend except the increased dividend, and from excluding the Plaintiffs, and from doing anything contrary to the resolution against changing the port, and to restrain *M.* and *T.* from acting as directors. After the action was commenced a requisition was handed in to the board to call an extraordinary general meeting for the purpose of considering certain proposed resolutions, the effect of which would be to confirm the resolutions in favour of which the unattested proxies had been given, and to rescind the resolutions on which the Plaintiffs relied. The Defendants summoned the meeting. The Plaintiffs then amended their writ, and asked for an injunction against the holding the meeting. *Chitty*, J., granted an injunction to restrain *M.* and *T.* from acting as directors, to restrain the Defendants from excluding the Plaintiffs, to restrain them from changing the port, and to restrain them from holding the meeting:—

The Court of Appeal considered that the matters in dispute were matters to be determined by the shareholders, and upon undertakings being given by both parties to keep matters *in statu quo*, discharged the order of *Chitty*, J., for an injunction and directed the appeal to stand over until the sense of the shareholders had been taken at a general meeting to be convened for that purpose. Such meeting was held, and a resolution was passed by a large majority rescinding the election of the Plaintiffs as directors.

The Court of Appeal, though holding that the resolution not having been passed as a special resolution was not an effectual exercise of the power given by the articles to remove directors, refused to grant an interlocutory injunction to prevent the exclusion of the Plaintiffs, but exacted an undertaking that *M.* and *T.* should not act.

THE *Union Steam-ship Company* was incorporated as a limited company, and was regulated by articles of association, adopted by special resolutions of the 17th of October, 1872, confirmed on the 7th of November, 1872.

The following clauses occurred in the articles:

"49. The directors may whenever they think fit, and they shall upon a requisition made in writing by not less than twenty of the members of the company, convene an extraordinary general meeting.

"50. Any requisition made by the members shall express the object of the meeting proposed to be called, and shall be left at the registered office of the company.

"51. Upon the receipt of such requisition the directors shall forthwith proceed to convene an extraordinary general meeting.

C. A. 1883 HARBEN v. PHILLIPS.

If they do not proceed to convene the same within twenty-one days from the date of the requisition, the requisitionists, or any other members amounting to the required number, may themselves convene an extraordinary general meeting.

" 59. At any general meeting, unless a poll is demanded by at least five members, a declaration by the chairman that a resolution has been carried, and an entry to that effect in the book of the proceedings of the company, shall be sufficient proof of the fact, without proof of the number or proportions of the votes recorded in favour of or against such resolutions.

" 60. If a poll is demanded by five or more members, it shall be taken in such manner as the chairman directs, and the result of such poll shall be deemed to be the resolution of the company in general meeting. In the case of an equality of votes at any general meeting the chairman shall be entitled to a second or casting vote.

" 65. Votes may be given either personally or by proxy.

" 66. The instrument appointing a proxy shall be in writing under the hand of the appointor, or if such appointor is a corporation, under their common seal, and shall be attested by one or more witness or witnesses. No person shall be appointed a proxy who is not a member of the company."

67 provided that proxies must be deposited at the office seventy-two hours before time for holding the meeting at which they were to be used, and that no instrument appointing a proxy should be valid after the expiration of twelve calendar months.

68. " Any instrument appointing a proxy shall be in the following form." Here followed a form concluding with a form of attestation, " signed by the said in the presence of ."

" 69. The number of the directors shall not be less than five, or more than ten."

" 85. The company may from time to time in general meeting increase or reduce the number of directors, and may also determine in what rotation such increased or reduced number is to go out of office."

" 87. The company in general meeting may by a special resolution remove any director before the expiration of his period of

office, and may by an ordinary resolution appoint another person in his stead.

"88. . . . . Three directors shall form a quorum for any meeting of the directors."

"90. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit. Any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations which may be imposed on them by the directors."

By a special resolution passed on the 17th of April, 1882, and confirmed on the 2nd of May, 1882, it was resolved

"That clause No. 68 of the articles of association of the company be and the same is hereby repealed, and that the following clause be substituted for the said existing clause, viz.: Proxies may be in the following form or such other form as the board of directors may from time to time approve." There followed a form of proxy differing in some particulars from the previous form and not containing any attestation clause.

On the 10th of November, 1882, a special meeting was held which had been convened for the purpose of considering whether *London* or *Southampton* should be the port for the arrival and departure of the company's ships, *Southampton* being the present port. A resolution was proposed that the ships should sail from and to *London*. An amendment was proposed for an adjournment to the 30th of November, which was carried by show of hands. A poll was demanded, which commenced forthwith, and the meeting was adjourned to the 15th of November. On that day the scrutineers having made their report, the amendment was declared lost. A further amendment was then proposed and seconded, that no change should be made in the port for twelve months, nor afterwards until sanctioned by a special general meeting. The amendment was carried by show of hands, and a poll demanded and taken. The meeting was adjourned till Wednesday, the 22nd, to receive the scrutineers' report.

On the 18th of November the annual ordinary general meeting was held. A resolution was proposed and seconded for payment of dividend at a certain rate proposed by the directors, and an amendment was carried by show of hands for a dividend at a

C. A. 1883 HARBEN v. PHILLIPS.

higher rate, and a poll demanded. Five of the seven directors remained in office. Resolutions were put for the re-election of *G. Y. Mercer* and the election of *Teape* as directors, and lost by show of hands. A poll in each case was demanded. A resolution was proposed and seconded that the number of directors should be limited to seven; but an amendment for increasing the number to ten was carried by show of hands, and a poll was demanded. Resolutions were then proposed and seconded for the election of *Harben*, *Romer*, *Cardus*, *Nicholson*, and *F. J. Mercer* as directors, and carried by show of hands, a poll being demanded in each case.

The meeting unanimously adopted a resolution that two votes should be taken. The first for the smaller dividend recommended by the directors and against it, and that those who voted against it should be considered to vote for the amendment. The second for the resolution limiting the number of directors to seven, and that those who voted against it should be taken to vote for the amendment thereon. That those who voted for the resolution should be deemed to vote for the re-election of *G. Y. Mercer* and the election of *Teape*, and that those who voted against it should be deemed to vote against *G. Y. Mercer* and *Teape* and for the election of *Harben* and the other four persons mentioned along with him. The poll was directed, and the meeting adjourned to the 22nd.

On the 22nd the scrutineers appointed at the meeting of the 15th of November made their report, finding that there were 4267 votes for the amendment and 6568 against it, but that 5969 of the votes against the amendment were by unattested proxies.

On the same day the scrutineers appointed at the meeting of the 18th of November made their report, from which it appeared that the votes for the dividend recommended by the directors were 5967, the votes against it 4946, and that of the votes for it 5131 were by unattested proxies. The votes for the resolution limiting the number of directors to seven were 6056, and those against it 4832, but of the votes for the resolution 5131 were by unattested proxies.

On the same day the adjourned special meeting and the adjourned ordinary meeting were held, and the scrutineers' reports

read. The chairman overruled the objections to the unattested proxies, and declared that the dividend recommended by the board had been carried; that the resolution limiting the number of directors to seven had been carried; that *G. Y. Mercer* had been re-elected and *Teape* elected; and that *Harben* and the four others had not been elected.

Harben, *Romer*, *Cardus*, *Nicholson*, and *F. J. Mercer*, on the 24th of November commenced their action on behalf of themselves and all the other shareholders, except the Defendants (making the company a co-Plaintiff), against the acting directors, including *G. Y. Mercer* and *Teape*, asking for declarations that the amendment as to the dividend and the amendment increasing the number of directors to ten were carried; that *G. Y. Mercer* and *Teape* had not been elected directors, and that the Plaintiffs had been elected, and that the amendment proposed at the adjourned meeting of the 15th of November had been carried. The Plaintiffs also claimed an injunction to restrain the Defendants from paying any dividend other than a dividend pursuant to the amendment of the 18th of November; to restrain *G. Y. Mercer* and *Teape* from acting as directors; to restrain the Defendants from excluding the Plaintiffs from acting as directors; and to restrain the Defendants from doing anything contrary to the amendment prohibiting the making a change in the port.

A weekly board-meeting was summoned in the ordinary way for the 28th of November. Three directors whose title to act as such was not disputed attended. Four of the Plaintiffs came, and were informed that they could not be recognised as directors. They protested and retired. The three directors present adjourned the meeting until the next day to the office of the solicitors of the company. On the 28th a requisition had been handed in by the requisite number of shareholders calling on the directors to convene an extraordinary general meeting. The meeting referred the requisition to a committee of three directors, and on the 29th a notice was issued for convening an extraordinary general meeting to be held on the 7th of December for the purpose of considering proposed resolutions to the following effect:—

1. That the shareholders disapproved of the name of the

C. A. 1883 HARBEN v. PHILLIPS.

company being used as co-Plaintiffs in the action. 2. That the resolutions declared by the chairman at the adjourned meeting of the 22nd of November to have been carried might so far as necessary be confirmed; and that the amendments then declared by the chairman not to have been carried might be rescinded. 3. That the election of *G. Y. Mercer* and *Teape* as directors might so far as necessary be confirmed; and that so far as necessary the resolution purporting to elect the Plaintiffs might be rescinded. 4. That it was desirable that the ships of the company should sail from *London*, and that so far as necessary the amendment to the contrary proposed at the adjourned meeting of the 15th of November might be rescinded.

The Plaintiffs thereupon amended their writ by adding a claim to have it declared that the meeting convened by the notice of the 29th of November had not been duly convened, and that if duly convened it would not be competent to pass the proposed resolutions 2, 3, and 4; and also claiming an injunction to restrain the Defendants from holding the meeting and from permitting it, if held, to entertain resolutions 2, 3, and 4, or any of them.

The Plaintiffs moved for an injunction (1) to restrain the Defendants from paying any dividend other than the larger dividend sanctioned by the amendment; (2) to restrain *G. Y. Mercer* and *Teape* from acting as directors; (3) to restrain the Defendants from excluding the Plaintiffs from the board of directors; (4) to restrain the Defendants from doing any act inconsistent with the amendment proposed at the meeting of the 15th of November; (5) to restrain the Defendants from holding the meeting summoned for the 7th of December, and from entertaining or permitting to be entertained at such meeting, if held, the proposed resolutions 2, 3, and 4, or any of them.

The motion came on for hearing before Mr. Justice *Chitty* on the 1st of December, 1882.

Ince, Q.C., *Romer*, Q.C., and *H. B. Buckley*, in support of the motion.

Benjamin, Q.C., *Macnaghten*, Q.C., and *Northmore Lawrence*, for the Defendants other than the Defendant *Giles*.

C. T. Giles, for the Defendant *Giles*.

The following authorities were referred to:—*Wandsworth Gas Light Company* v. *Wright* (1); *Pender* v. *Lushington* (2); *Pulbrook* v. *Richmond Consolidated Mining Company* (3); *Duckett* v. *Gover* (4); *In re Horbury Bridge Coal, &c., Company* (5).

CHITTY, J.:—

By this motion the Plaintiffs seek to enforce certain resolutions of the *Union Steam-ship Company*, which they allege to have been duly passed at a general meeting of the company. The Plaintiffs are Mr. *Harben* and others who were shareholders, and who also claim to be directors suing on behalf of themselves and of other shareholders, and they have joined the company as co-Plaintiffs, and there is a cross motion to strike out the name of the company as Plaintiffs.

The first and principal question to be decided is with reference to the validity of certain proxies. [His Lordship stated the facts.] The whole question turns upon the construction to be put on the 66th, 67th, and 68th of the articles of association, and upon the 68th article as it was subsequently amended. By the 66th article the instrument appointing the proxy was to be in writing and attested by one or more witness or witnesses, and it was also provided that "no person shall be appointed a proxy who is not also a member of the company."

By the 68th article it is provided that "any instrument appointing a proxy shall be in the following form." The form then is set out, and at the end of the form are the words "signed by the said in the presence of ." The 68th article was amended at meetings by a special resolution duly passed in May, 1882. The amended article runs thus: "That clause 68 of the articles of association of the company be and the same is hereby repealed, and the following clause be substituted for the said existing clause, namely, 'proxies may be in the following form or in such other form as the board of directors may from

(1) 22 L. T. 404.
(2) 6 Ch. D. 70.
(3) 9 Ch. D. 610.
(4) 6 Ch. D. 82.
(5) 11 Ch. D. 109.

C. A. 1883 HARBEN v. PHILLIPS. Chitty, J.

time to time approve.'" And then the form is set out. It varies in some particulars which I need not stay to mention from the form which is contained in the repealed 68th article; in the amended article there is no such attestation clause as that which occurs at the foot of the form in the original 68th article. Upon this statement it is clear that the 66th article has not been repealed or in any way affected. The 66th article requires that the proxies shall be attested by one or more witnesses. The omission to insert those words "Signed by the said in the presence of " in the new 68th article cannot affect the 66th article at all. The special resolution in pursuance of which the alteration was made does not purport in any manner to deal with the 66th article, and I am of opinion that the 66th article remains in full force, and that the attestation by one or more witnesses is required.

It was argued by Mr. *Benjamin* that this was a directory, and not an imperative clause. It is difficult to see the application of that well-known principle to such an article as this. By the general law members of a company cannot vote by proxy unless there is a special resolution enabling members so to vote. To my mind it might just as well be said that the portion of the article, that no person shall be appointed a proxy who is not a member of the company was directory, or it might also as well be said that the delivery of the proxy seventy-two hours before the meeting was directory. Seeing that the 66th article contains a special power, it is, to my mind, clear that the special power must be duly observed. The result, therefore, is that the proxies which were not attested are invalid, and so far as this part of the question in the case is concerned that the chairman came to a wrong conclusion, and in fact, as is admitted, if the unattested proxies are rejected, the resolutions proposed by way of amendment, both at the special meeting of the 15th of November and the general meeting of the 18th of November, were duly carried.

It was also argued on the part of the Defendants that the declaration of the chairman was final, which is certainly, to my mind, rather a startling proposition, but the answer to that is contained in articles 59 and 60. The 59th article is—[His Lordship read the article].

But the 60th article goes on to provide that, "If a poll is demanded by five or more members, it shall be taken in such manner as the chairman directs, and"—this is the important part of it—"the result of such poll shall be deemed to be the resolution of the company in general meeting." The result of the poll, as I have already said, was in favour of the amendment, and the declaration of the chairman is in no way made an essential part of the proceedings. Where a poll is demanded, the chairman has simply a ministerial duty to perform, and he ought to have declared, so far as any declaration on his part is required, that the amendments were duly carried. It is said on this point that, according to what was said by Lord Justice *James* in the case of *Wandsworth Gas Light Company* v. *Wright* (1), I am not entitled to sit here and take a scrutiny. I, however, am not entering upon the question of the scrutiny here, I am not taking a scrutiny of the votes, but I am acting simply on the admitted facts, and I am simply called upon to pronounce and do pronounce my opinion on this result of the admitted facts as it is reported by the scrutineers to me.

Then again it is said that the Court ought not to interfere in a case of this kind, seeing that it relates to the internal affairs of a company with reference to a vote passed, but the decision of the Master of the Rolls in the case of *Pender* v. *Lushington* (2) shews that this proposition cannot be maintained. There the chairman, acting honestly, rejected votes, for what reason I need not consider, and the Master of the Rolls said he was wrong in rejecting them, and granted an injunction on the footing of the resolution having been duly passed.

Now some of the resolutions relate to the appointment of directors. There are, according to the amendments, which, as I have already stated, were, in my opinion, passed, ten directors. With reference to five of them there is no question that they are directors, and those directors will be found on the Defendants' side of the record. With reference to the directors who are Plaintiffs, they claim to be directors on the footing that the resolution was passed. I have said I think that that resolution was a good one, and the resolution is that they were duly

(1) 22 L. T. 404. (2) 6 Ch. D. 70.

C. A. 1883 HARBEN v. PHILLIPS. Chitty, J.

appointed to be directors. Then the argument goes to this length, it is difficult almost to state the proposition, but it is said the directors who have usurped the office since the passing of these resolutions (the proposition relating especially to two of the Defendants who were candidates for re-election or election, and who were rejected by the amendment) are directors *de facto*, though they may not be so *de jure*, and again some observations of Lord Justice *James* in the case of *Wandsworth Gas Light Company* v. *Wright* (1) are referred to. It is said that the Court will not interfere at the instance of a person who asserts that he is a director, but the decision of the Master of the Rolls in *Pulbrook* v. *Richmond Consolidated Mining Company* (2) is entirely opposed to the proposition, and besides that, in the present case I have the company, whether rightly or wrongly I will consider in a moment, joined as co-Plaintiffs, and although it has been said that the directors are mere agents of the company, and have no interest in their office, it was held by the Master of the Rolls, in the case last referred to, that Mr. *Pulbrook* was entitled to assert that he was duly appointed a director, and to obtain an injunction to prevent the other directors from excluding him from acting.

The result is that there are ten directors. The Defendants *Mercer* and *Teape* are not directors. The five Plaintiffs are five of the ten directors. As to Mr. *Giles*, one of the Defendants, there is no question, and there is no question also as to the four first Defendants being directors.

One of the resolutions which was carried in my opinion at the general meeting relates to a dividend, and the dividend which is proposed to be paid is not the dividend which was sanctioned. The 94th article requires the sanction of the company in general meeting, and no such sanction has been obtained with reference to the dividend that is proposed to be paid. Consequently the Plaintiffs are right on the question as to that dividend. Whether it is material, or whether they may care to insist upon an injunction may be another matter, because the dividend on which the Plaintiffs are insisting is the larger and not the lesser one. It does appear that some of the dividend warrants

(1) 22 L. T. 404. (2) 9 Ch. D. 610.

had been sent out, and inasmuch as it has been admitted that the lesser dividend must in any event be paid, it may be that the Plaintiffs, when I come to settle the form of the order, will not think it necessary to insist upon an injunction with regard to the dividend.

Now I come to the second main question, with reference to the holding of a meeting on Thursday next. The facts with regard to this point lie in a small compass. On the 28th of November a notice had been given for the holding of a board meeting at the registered office of the company. Four of the Plaintiffs attended at the place and asked for admittance, but there were four of the Defendants, that is to say, the Defendants I think other than Sir *Benjamin Phillips* and Mr. *Mercer*—there were three who unquestionably were directors, and one I have held not to be a director, already in the room. The Plaintiffs who asked for admittance were refused admittance by the secretary, acting by the direction of those who were for the moment in possession of the board room. Of course it would have been unseemly that there should be anything like a violent contest in this matter, and having duly protested, the Plaintiffs retired. There is no material dispute as to what took place. The persons so in possession of the board room, and purporting to act as a board, adjourned their meeting until next day—and adjourned not to the usual place of business, but to the office of a solicitor, who I believe has been acting as the solicitor of the company, and at the adjourned meeting—the so-called adjourned meeting—held on the 29th of November a requisition was handed in, which it was stated, and I have no doubt correctly stated, had been delivered at the registered office of the company on the previous day. The 49th, 50th, and 51st articles contain provisions to this effect, that the directors may, whenever they think fit, and they shall upon a requisition being made by not less than twenty members, convene an extraordinary meeting. The requisition is to express the object for which the meeting is to be called, and is to be left at the registered office of the company. Upon the receipt of the requisition, the 51st article provides that the directors shall forthwith proceed to convene an extraordinary general meeting. If they do not proceed to convene the meeting within

C. A. 1883 HARBEN v. PHILLIPS. Chitty, J.

twenty-one days of that date then the requisitionists themselves may call an extraordinary general meeting. The so-called adjourned meeting was attended by three of the Defendants, and they proceeded to appoint a sub-committee under the articles for the purpose of making arrangements with reference to the holding of the general meeting in pursuance of the requisition. Article 88 provides that three directors shall form a quorum, and article 90 provides that the directors may delegate any of their powers to committees consisting of any such member or members of their body as they think fit. The sub-committee made arrangements for the holding on the 7th of December of a general meeting pursuant to the requisition, and immediately issued notices, accompanying their notices with statements of their views with reference to the questions which were at issue between them and their opponents. I may state here that one of the main points, in fact the main ground of dispute in the company, is whether business which is now carried on at the port of *Southampton* shall be transferred to the port of *London*, and in the notice sent of the meeting it was requested evidently, seeing the urgency of the occasion, that the proxies should be signed and sent back by return of post. Now, in this state of things, I hold that the exclusion on the 28th of those who, as I have already said, were duly elected directors, was unlawful. I consider that the meeting of the 28th therefore was an unlawful meeting, that it was not properly constituted, and that everything that was done at it is invalid. The adjourned meeting was invalid, the appointment of the sub-committee was invalid, and the notice convening the meeting is invalid.

Now the Defendants rely on the 88th article, which I have already mentioned, and they say that a quorum was duly present. But that proposition cannot be maintained for a moment. The presence of a quorum does not prevent lawfully constituted directors from attending, or allow a portion of the board to exclude the others. They also say that the requisition is good because it was delivered at the office within the 49th and 51st articles. The requisition may be good, and probably is. I see no reason at the present moment to say that the requisition is otherwise than a valid requisition, but the board under the

articles which I have read have a discretion as to the time when they will call a meeting. The term used undoubtedly is "forthwith." It is said that it is a mere ministerial act, but the board have twenty-one days within which to make their preparation, and a meeting which is called by the governing body of a large company, such as this, is entitled to have the benefit of the exercise of the discretion of the governing body as to the time within which the meeting should be called, provided of course that such time falls within the terms limited by the articles. The governing body who call the meeting have always, as shewn by the facts of this case, a great advantage, because they in fixing the time of calling the meeting send out their notices, and send out, accompanying their notices, statements of their views upon the question. And I must say in regard to this part of the case that the Defendants appear to have tried to snap a vote from the fortunate or unfortunate shareholders who do not take the trouble to attend the meetings, but vote by proxy. No doubt, as a general proposition, the influence of the governing body on those who do not attend is considerable. There are many shareholders who are incompetent really to form an opinion themselves upon the main question at issue, and who are content to be guided by the judgment of those who are in the position of the governing body. Therefore, to my mind, this question is one of great importance with reference to the fair ultimate decision of the question which sooner or later will have to be decided by the constituency of the company as a whole.

Then the Defendants addressed to me a remarkable argument founded on the 93rd article, which provides in the usual form that acts done by any meeting of the directors, or of a committee of the directors, or by any person acting as a director, shall notwithstanding it shall afterwards be discovered that there was some defect in the appointment of such directors, or persons acting as aforesaid, or that they or any one of them be disqualified, be as valid as if every such person had been duly appointed, and was qualified to be a director. The Defendants' counsel advanced the proposition that notwithstanding the defect which they say may exist with reference to the appointment of directors, the notice that has been sent out is valid. But this is wresting or attempting

C. A. 1883 HARBEN v. PHILLIPS. Chitty, J.

to wrest the 93rd article to a purpose wholly different from that which is intended. The general object of articles of this kind is to protect outside persons who deal with the corporation. The article itself provides merely for the validity of the acts done, notwithstanding it shall afterwards be discovered that there is a defect in the appointment. But here the defect had been discovered before that portion of the board which purported to act in the name of the board had sent out the notices, and this fact to my mind completely answers the argument.

In the result, and taking the case as a whole, it is plain from what I have said that unless I do interfere now by an injunction the affairs of this company will be in intolerable and almost inextricable confusion. I hold, consistently, I believe, with the principles which have been laid down in this Court, that I can interfere with reference to the questions relating to who are and who are not directors, so as to give effect to a general resolution passed by the company, and I may say that if the Plaintiffs have rightly added the name of the company, it appears to me to be matter almost of course, adopting the language of Lord Justice *James* in the case of *Wandsworth Gas Light Company* v. *Wright* (1), because the directors are at least agents in some senses of the corporation. They are its managing partners, and it is a matter almost of every day's experience to restrain a managing partner from violating the articles of partnership, and it is also a matter of almost weekly practice to restrain a person from acting as agent for a partnership when he has no authority to do so, and also to grant an injunction to restrain one partner (if I may take the analogy of partnership) from excluding the other partner or partners from the management. I have therefore no hesitation on any general principles in interfering to the extent I am asked to interfere by this motion. It is said that all this matter will be properly decided by the company at the general meeting to be held on the 7th of December; but that which is said to have occurred already at one of the general meetings will probably occur at this general meeting, namely, that there will be, as was said, I think, in one of the affidavits, great tumult and uproar, and those who attend the meeting, the company, will not know

(1) 22 L. T. 404.

who really are, and who really are not, the governing body of the company itself.

Now I come to the cross motion, which is to strike out the name of the company as Plaintiffs. The rules of the Court with reference to such a matter are now clearly established. The cases are *Duckett* v. *Gover* (1) and *Pender* v. *Lushington* (2). The directors have a right *primâ facie* to use the name of the company, but the company in general meeting may refuse to allow the directors to use the name of the company. In *Duckett* v. *Gover* the action was brought by shareholders, on behalf of themselves and others, without adding the name of the company. The Master of the Rolls thought that was a slip on the part of the pleader, and on demurrer allowed it to stand over with liberty to add the name of the company. What took place afterwards is not reported, although there is some statement in a later case by the Master of the Rolls of what occurred, but I, having been counsel in the case, recollect exactly what did take place, which was this: The Plaintiffs were directors, but I think not all the directors, and the state of the company being such that they could not hold a general meeting themselves without calling a board meeting, they added the name of the company as Plaintiffs, and on a motion to strike out the name of the company, the Master of the Rolls refused to remove the company, holding that the directors, even though they had not called a meeting, were entitled to use the name of the company. I have not the whole body of directors here, I have only some of them who have made use of the name of the company, but inasmuch as the persons suing other than the corporation, are suing on behalf of themselves and all others, and are suing to enforce a general resolution passed by the company, I think that they have *primâ facie* a right to use the name of the company, and even if they had not it would fall within one of the well-known exceptions to the rule, that inasmuch as there would not be in such a case as this the opportunity of getting the sanction of the company to use its name before the evil intended to be prevented by the injunction would occur, there would be a right in those who seek to enforce the general resolutions of the company to make use of the company's name, and that I take to

(1) 6 Ch. D. 82. (2) 6 Ch. D. 70.

C. A. 1883 HARBEN v. PHILLIPS.

be the true effect of the Master of the Rolls' judgment in *Pender* v. *Lushington* (1).

In the present circumstances, therefore, I find no sufficient ground for the motion to strike out the name of the company.

G. M.

An order was made granting an injunction as asked by heads two, three, and four of the notice of motion, and also an injunction to restrain the Defendants from holding the meeting called for the 7th of December.

C. A. The Defendants appealed, and the appeal was heard on the 5th and 6th of December, 1882.

Benjamin, Q.C., *Macnaghten*, Q.C., and *Northmore Lawrence*, for the Appellants:—

The main question for the decision of the Court is whether the proxies were invalid because they were not attested by a witness; we maintain that they were valid. It is a false analogy to compare the position of a shareholder to that of a trustee, or the holder of a franchise. His right to vote is a right incidental to his own property, and he is bound by no obligation as to the mode of exercising it. Therefore the form of proxy is quite immaterial; the only object of attesting it is to secure its genuineness. The 66th article which prescribes that the proxy shall be attested is only directory, there are no negative words in that part of the clause: *Lindley* on Partnership (2); *Foss* v. *Harbottle* (3). And when the 68th clause was amended and a new form of proxy substituted, the direction as to attestation was virtually repealed. Supposing the proxies are invalid the Court will not interfere *brevi manu* to give effect to a technical objection when it is quite clear that the policy advocated by the Plaintiffs is opposed to the wishes of the great body of shareholders. The matters in dispute ought to be submitted to a general meeting, and the Court will not restrain the holding it.

Ince, Q.C., *Romer*, Q.C., and *H. B. Buckley*, for the Plaintiffs:—

The special resolution does not abrogate article 66, and the

(1) 6 Ch. D. 70. (2) Vol. ii. p. 824.
(3) 2 Hare, 461, 495.

proxies are manifestly irregular. The Plaintiffs then were duly elected and *G. Y. Mercer* and *Teape* are not directors. In *Pulbrook* v. *Richmond Consolidated Mining Company* (1) an injunction was granted on motion to restrain the Defendants from excluding a co-director.

[COTTON, L.J.:—I do not doubt the jurisdiction to interfere. The question is whether we ought to interfere when an extraordinary meeting can be called in so short a time. The points in dispute are points for the consideration of the shareholders. Then how can an injunction be right which prevents the shareholders from meeting.]

It does not prevent their meeting, and it is right that the Defendants should be restrained from treating it as a regular meeting, when it has been convened by a board of directors not duly constituted.

[The COURT suggested that certain undertakings should be given by the parties and that they should concur in calling a fresh general meeting. The undertakings were accordingly given which are mentioned in the judgment of Lord Justice *Cotton*.]

COTTON, L.J.:—

The arrangement which has been come to between the parties and the undertakings which have been offered on both sides render it unnecessary to decide some of the questions which arise here, but I think it right that the Court should express its opinion on the question whether certain proxies were properly received at meetings held on the 15th and 18th of November. The 66th article required proxy papers to be attested by a witness and a form containing an attestation clause was given by the 68th article. In last April a special resolution was passed which appears to have been intended to obviate the necessity for attestation by a witness. This resolution repealed article 68, and introduced a new form of proxy paper not containing an attestation clause. The proxies now objected to are alleged to have been invalid, because the signatures were not attested, and I am of opinion that this contention is well founded. The resolution

(1) 9 Ch. D. 610.

C. A. 1883 HARBEN v. PHILLIPS. Cotton, L.J.

which was passed in April in no way purported to alter article 66, though it altered the form of the proxy as previously given by the articles, and in my opinion it can not be taken that that resolution in any way does away with article 66, and therefore *primâ facie* these proxy papers are not in the form required by the articles. It was contended, however that they were nevertheless valid and effectual proxy papers, and it was put, as I understood, by Mr. *Benjamin* in this way, that the direction as to the attesting witness was not essential, but directory only, and that the absence of attestation did not render it necessary for the Court to reject proxies given in exercise of the right which, as he contends, a shareholder has, independently of contract, to vote by proxy. I cannot accede to the view that this rule, that proxies shall be attested, is to be treated as what is called directory only, and that non-compliance with it will not invalidate the proxy paper. Article 66 gives various directions as to what is to be done in appointing a proxy. "The instrument appointing a proxy shall be in writing under the hand of the appointor, or if such appointor is a corporation under their common seal, and shall be attested by one or more witness or witnesses. No person shall be appointed a proxy who is not a member of the company." It is impossible to say that one of these provisions is more directory than other. It was not contended that its being in writing was merely directory, and Mr. *Benjamin* admitted that writing was essential to prevent the frauds which might be practised if a mere oral nomination would properly appoint a proxy. In my opinion the attestation is as essential, and as much a thing agreed upon by the parties as being of the essence of the paper, as its being in writing, or its being left at the office a certain time before the beginning of the meeting. But the whole of Mr. *Benjamin's* argument really depended on this, that there was a right independently of contract to vote by proxy. I cannot accede to that. In my opinion the right of a shareholder to vote by proxy depends on the contract between himself and his co-shareholders, and where parties have a right depending upon the contract between them and the other parties, there, in my opinion, all the requisitions of the contract as to the exercise of that right must be followed. In my opinion, therefore, the proxy papers which

were not attested as required by the articles were improperly admitted by the chairman. Those votes ought to have been rejected. It follows from this, that the resolutions which the Defendants allege to have been carried at those meetings were not duly carried, and that the Plaintiffs are *primâ facie* at the present moment the persons to be considered as having been elected jointly with the five first Defendants as directors of the company, and that *G. Y. Mercer* and *Teape* were not duly elected.

It does not, however, follow from this that the Court ought necessarily to interfere, because although it may be that the Defendants have improperly excluded the Plaintiffs from acting as directors, yet, in my opinion, it is not the duty of the Court to interfere, if no immediate harm is likely to result from the proceedings of the Defendants, when a meeting of the company will be held in a very short time, which can have submitted to it the question whom the company really wishes to be its directors, and also what policy it wishes to be adopted in the conduct of its business. If it appeared to the Court that the Defendants were acting on an erroneous construction of their articles, and under an erroneous construction were intending to exclude from voting those who ought to vote, or intending to act on the resolution in a matter essential as regards the well-being of the company, I should say that it would be the duty of the Court to intervene at once on interlocutory motion to prevent the Defendants from acting in violation of the constitution of the company in a matter where their so acting until the company met would be likely to do serious harm. But here, having regard to the undertakings which were offered by Mr. *Macnaghten*, I see no necessity for the interference of the Court, and I should have declined to make any order whatever, unless an undertaking were given by the Plaintiffs so as to prevent them in the short interval of time between the present hearing of the motion and the calling of the meeting from acting in this matter, which is one for the consideration of the shareholders, in a way which probably may be—I do not say it is—against the wishes of the majority of the shareholders. No doubt the question of the valid election of the directors is a question of law, and is to be decided according to the true construction and effect of the articles of association; but

C. A. 1883 HARBEN v. PHILLIPS. Cotton, L.J.

one cannot forget that the struggle was not only about the directors, but about the policy which was to be adopted by the board, one set of directors being minded to carry on the business at one place, the other set of directors being minded to carry it on at the other, and there being also a question whether a large reserve should be kept by the company, or whether the dividends should be increased. Those are questions which it is for the shareholders to settle, and which this Court has no right to decide, and unless, therefore, an undertaking such as has been offered on behalf of the Plaintiffs had been given, I think the proper course in this case would have been to have refused any order upon the application that was made to Mr. Justice *Chitty*, and to leave matters as they stood until the meeting could decide how and by whom the business was to be conducted.

But there is to my mind very grave doubt whether the meeting which was convened by the Defendants after they had excluded the Plaintiffs from the board could be considered a proper meeting convened under the 51st article, and if it was not a proper meeting great confusion might arise. If the meeting was an irregular one, not properly convened by the board, the resolutions passed at it could not alter or repeal the previous resolutions, and could not effectually regulate the concerns of the company, or displace the directors whom the majority may think it right to displace. Under these circumstances I think that the proper order to make will be to discharge the order of Mr. Justice *Chitty*, and to restrain the Defendants from presiding at the meeting called for the 7th of December, as an extraordinary meeting of the company convened under art. 51, or from representing it to be such a meeting, the order being prefaced with the following undertakings which the Plaintiffs and Defendants are ready to give. There will be an undertaking by the Plaintiffs till further order not to do anything except for the purpose of carrying on the current business of the company in the ordinary way. The Defendants will give a similar undertaking. The Plaintiffs other than the company are also to undertake to concur with the Defendants, without prejudice to any question, in giving a notice convening an extraordinary general meeting for the forenoon of the 16th of December inst., and must also undertake not to pay

the increased dividend approved by the resolution. Then both Plaintiffs and Defendants must undertake not to issue any circular representing their separate views as emanating from the office, or as being a circular of the board, and the Defendants *G. Y. Mercer* and *Teape* will undertake, until further order, not to act as directors, there being at least a *primâ facie* case, in my opinion, that they are not properly appointed directors. There must also be an undertaking by the Plaintiffs and the Defendants (though I think that the undertakings already given would cover it) not to act on the resolutions of the former meeting until further order. This will prevent a transfer of the business from *Southampton* to *London* until such transfer has been approved by the majority of the shareholders. What we wish is to enable the matter to be effectually settled by a proper and undoubted meeting of the shareholders, and to leave to the shareholders their undoubted right of settling in their own way what is to be their policy, and how their business is to be carried on.

BOWEN, L.J.:—

I am of the same opinion. It seems to me perfectly clear that the proxies in question ought to have been rejected. None of them were attested, and by the articles of association there is an express provision that the proxies shall be attested by one or more witness or witnesses. It has been argued at length by Mr. *Benjamin* that the provisions in the articles of association were directory merely, and might be passed over without vitiating the proxy, a proposition which, carried out to its logical results, would I think have some startling effects on the conduct of the business of companies. The first observation which occurs to me is this, that there is no common law right on the part of a member of a corporation to vote by proxy. We know, of course, that in many cases a man may do through another person what he may lawfully do himself. That rule does not carry one very far, because when examined it will be found simply to amount to this, that a man may do for another person all acts such as in their nature can properly be and are intended to be done by a delegate, so that it amounts to very little more than an identical proposition. But when persons agree to act together in the conduct of a business,

C. A. 1883 HARBEN v. PHILLIPS. Bowen, L.J.

the way in which that business is to be carried on must depend in each case on the contract, express or implied, which exists between them as to the way of carrying it on. Now, in the first place, at common law a proxy could not be used by a member of a corporation unless there was some specific provision which enabled him to do so. When you come to statutory corporations you must look at the statute itself, and the rules which are created under it, to see whether it is the intention of the statute or the rules that a proxy should be used, and, if so, in what form it should be used. We find it prescribed that it is to be an instrument in writing attested by one or more witness or witnesses. The proxies objected to were in writing, but were not attested, and that being so I do not see how they can be proxies at all within the articles of association.

We come then to what is the real point of the case, whether the Plaintiffs are entitled at this stage of the action and on motion to insist upon the Court interfering with the meeting which is called for the 7th inst. on the ground that the proxies were irregular. Now that the Court would interfere to prevent a board not duly constituted under the articles of association from convening, or purporting to convene, extraordinary meetings and from holding extraordinary meetings which would be invalid, as not being summoned by competent authority, I have never doubted. The only question, as it seems to me, is whether on motion at this stage the Court should interfere under the special circumstances except upon terms. The circumstances of the case are exceptional. The business of the company appears to have been carried on for some time with proxies which contained this flaw. At the last moment advantage is taken of this flaw, I will not say by a minority of the company, because that would be pronouncing an opinion without full materials for doing so, but by what, so far as we can judge from the materials before us, is extremely likely to turn out to be not only a minority, but a decided minority, to place themselves in the seat of power and control of the company. Those who think they are the majority, and who feel that they are being aggrieved by this technical objection being taken at the last moment, desire at once to convene a meeting of the company. No one can doubt that the

Court ought not to interfere in the conduct of the company's business further than is absolutely necessary. A meeting of shareholders is at once looked to as the source from which help can come. People ought to be allowed as far as possible to manage their own affairs without interference by a Court of law. Then comes the difficulty that the persons convening this meeting are acting on the supposition that they have a right to rely upon the proxies which in the opinion of the Court ought to have been rejected, but is the Court bound to interfere upon motion on the part of the Plaintiffs without terms being imposed upon them that in the meantime, at all events, they will not take advantage of their position to effect an alteration in the state of the company's affairs which may be against the wish of the great body of the shareholders? I think not; one reason being that there is an outstanding question whether the past conduct of the Plaintiffs does not prevent their taking this point about the proxies. I rather, however, rest my opinion upon the broader ground that I should not wish except upon terms to put any obstacle in the way of any attempt, however doubtful perhaps in its validity, to get at once to a general meeting. I therefore agree entirely with what Lord Justice *Cotton* has said. It seems to me that if the terms which he has arranged are loyally acted upon by both sides, as no doubt they will be, they will furnish the best means of extricating the company's affairs from the temporary confusion into which they have fallen.

The undertakings mentioned by Lord Justice *Cotton* having been given, the order of Mr. Justice *Chitty* was discharged, and it was directed that the motion should come on again before the Court of Appeal after the general meeting had been held, the present order to be without prejudice to any question, except as to the validity of the unattested proxies.

H. C. J.

An extraordinary general meeting of the shareholders of the *Union Steam-ship Company*, convened in accordance with the said order of the Court of Appeal, was held on the 22nd of December, 1882, and by adjournment on the 3rd of January, 1883, and at such meeting, *inter alia*, a resolution rescinding the election of

C. A. 1883 HARBEN v. PHILLIPS.

the Plaintiff *Henry Harben* and the four other persons as directors, and declaring *George Y. Mercer* and *Richard Teape* elected directors of the company, was carried by a majority of 1113, and also a resolution that the meeting disapproved of the name of the company being used or continued as co-Plaintiff in the action was carried by a majority of 1160.

Under these circumstances the case came on again before the Court on the 7th of March, 1883, it being admitted that the passing of the resolution rescinding the election of the Plaintiffs as directors was ineffectual for their removal from office.

Macnaghten, Q.C., and *Northmore Lawrence*, for the Appellants (the Defendants).

Ince, Q.C., and *H. B. Buckley* (*Romer*, Q.C., with them), for the Plaintiffs.

The following authorities were cited: *Imperial Hydropathic Hotel Company, Blackpool* v. *Hampson* (1), *Wandsworth Gas Light Company* v. *Wright* (2), *MacDougall* v. *Gardiner* (3), *Pulbrook* v. *Richmond Consolidated Mining Company* (4), *Munster* v. *Cammell Company* (5), and *Pender* v. *Lushington* (6).

COTTON, L.J.:—

This case comes before us in a very different position from that in which it was when we last heard it, as there has been passed a resolution at the general meeting of the shareholders that such meeting disapproved of the use of the name of the company as co-Plaintiff. The consequence of that resolution is that the name of the company must be struck out as co-Plaintiff, and it should be added as Defendant. The action, then, is an action by persons who claim to be directors, and who, being shareholders, sue on behalf of themselves and all other shareholders in the company other than the Defendants. I do not express an opinion as to how far such an action may be maintained, or as to whether it ought to be an action by the company, as in my opinion there

(1) *Ante*, p. 1.
(2) 22 L. T. 404.
(3) 1 Ch. D. 13.
(4) 9 Ch. D. 610.
(5) 21 Ch. D. 183.
(6) 6 Ch. D. 70.

C. A.
1883
HARBEN
v.
PHILLIPS.
Cotton, L.J.

can be no doubt that in the present action the Court ought not to interfere in order to compel against the will of the company the allowing certain persons to act as directors. The position of persons coming here as shareholders on behalf of themselves and others is not such as in my opinion should induce the Court to force on the company against its will certain persons as directors whose position as directors is questioned, rightly or wrongly. In *MacDougall* v. *Gardiner* (1) Lord Justice *Mellish* says: "In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes." Well, now the company is no longer Plaintiff, and whatever the effect may be as regards the right of the Plaintiffs to say that they still are directors, the company has expressed its wish, at a meeting called for that purpose, that these Plaintiffs shall not act as directors and shall not control the operation of the company in a way the majority do not approve. It has been argued that there is no other way of ascertaining the wish of the company except that which is pointed out by the articles of association, and that as regards the Plaintiffs being directors or not, the only way in which the company, who have once elected them, can express its wish that they shall be no longer directors is by special resolution, which has not been carried. In my opinion that is a fallacious use of the word "wish." If there is no power given by the articles of association to remove a director, all the shareholders cannot say effectually that he is to be removed, for it has been decided that there is no power to remove a director unless it is given by the articles of association; but no one can doubt that the wish of a corporation that certain persons should not be directors may effectually be expressed by any meeting of the shareholders duly called for such purpose, although such wish may not be effectual to remove the persons appointed to the office of directors. Then

(1) 1 Ch. D. 25.

C. A. 1883 HARBEN v. PHILLIPS. Cotton, L.J.

it comes to this, that we have in the resolution of that meeting an expression by the majority of the shareholders of the company of a desire that the Plaintiffs should not be directors, and that the policy advocated by the Plaintiffs should not be that which should be adopted by the company, and what this Court is asked to do is, as against the wish of the majority of the shareholders, to interfere by injunction to compel in fact the company and the other members of the board to allow the Plaintiffs to act as directors.

Now, in determining whether the Court should so interfere, we must not only consider the expression of the wish of the majority of the shareholders as shewn at that last meeting, but in my opinion we must also consider how it was that the Plaintiffs came to be appointed to be directors. I assume that they were effectually appointed directors of this company, although of course at the hearing we can listen to any argument which the Defendants may think fit to advance to shew that they were not properly elected. But then, assuming they were rightly elected, the election was only by an accident arising from many of the shareholders who desired that some one else should be appointed, sending their proxies in such a way that the votes expressed by them could not be legally used. Taking that, as I do, into consideration, this Court ought not, in my opinion, to interfere on this motion by compelling the company to put the management of its affairs into the hands of the Plaintiffs, or by requiring the other directors to receive the Plaintiffs as co-directors. Cases were referred to, to shew there was authority for the Court to so interfere; but there was no case which touches the point on which I decide this. In the case of *Munster* v. *Cammell Company* (1) there was a question between the board and a general meeting of the shareholders as to who could legally appoint; there was no express wish by the corporation that the gentleman whom the directors had chosen as director should not be a director, as there was no personal objection to him, and the only question being who had the legal power to elect, it was decided on motion that the board had power to elect in the case of a vacancy which had not been filled up by the general meeting, and that therefore

(1) 21 Ch. D. 183.

the person chosen by the board was duly elected. In the *Imperial Hydropathic Hotel Company, Blackpool* v. *Hampson* (1) the position was entirely the reverse of what it is here, for there the company came and asked the Court to interfere to restrain a person from acting as director on the ground that the company had removed him. That is a very different thing. It is a very different thing to say that the Court will not interfere to force a director on a company and to say that a company cannot ask the Court to restrain a particular man from acting as a director if the resolution by which they have attempted to remove him has been ineffectual, and therefore he is still in the position of being a director.

The only other case cited for the Plaintiffs was *Pulbrook* v. *Richmond Consolidated Mining Company* (2), which was an action by a gentleman against his co-directors simply, and where there was not any such expression of the wish of the corporation as to how their business was to be managed, and who should manage it, as there has been in the present case. Now, subject to the undertaking which we require the Defendants to give, I think we ought not to interfere, because to do so would be to require the company, when their wish is strongly expressed against these Plaintiff directors having the management and control of the company, to hand over to them the control, and that too when they became directors by what may be considered an accident, namely, a slip in preparing the proxies used at the meeting at which they were elected. That being so, in my opinion, the Court ought to make no order at all on the original application, or on this, in which I suppose it now comes before us on a renewed application by the Plaintiffs. The Defendants must undertake that the two Defendants *Mercer* and *Teape* shall not until further order attempt to act as directors. We make then no further order, except of course that the name of the company be struck out as Plaintiff and be added as Defendant.

BOWEN, L.J.:—

I am of the same opinion. What relief, if any, the Plaintiffs may be entitled to at the hearing is a matter I desire to leave

(1) *Ante*, p. 1. (2) 9 Ch. D. 610.

C. A. 1883 HARBEN v. PHILLIPS. Bowen, L.J.

entirely open. I am not satisfied if it had now to be decided, that, assuming the Plaintiffs to make out their case in other respects, this is a matter in which perpetual injunction is the relief to which they are entitled, but I wish to leave that entirely open, and to decide this case on the ground simply that although there is a great inconvenience whichever way we decide, I am by no means satisfied that the balance of convenience is in favour of granting an injunction. One cannot help seeing that this company has got into a very unfortunate position for the transaction of even its most ordinary business, and it is difficult to say what can be done to relieve it so long as both parties insist upon prosecuting their own views of their legal rights, but on the whole the best thing to do is, I think, to leave the matter to stand as it is and refuse the application of the Plaintiffs, Mr. *Macnaghten* giving the undertaking that the two directors whom he represents, and whose election is open to doubt, should not act until the hearing.

Solicitors for Plaintiffs: *Bircham & Co.*
Solicitors for Defendants: *Hollams, Son, & Coward.*

W. P.

C. A. 1883 CHITTY, J. *Jan.* 11. C. A. *Jan.* 17.

QUILTER *v.* HEATLY.

[1882 Q. 37.]

Practice—Production of Documents referred to in Pleadings—Rules of Court, 1875, *Order* XXXI., *rr.* 14–17.

The Plaintiff by his statement of claim referred to certain entries in his own books, to two letters written to himself, and to two letters written by himself. The Defendant as soon as the statement of claim was delivered applied for production of the books, of the letters written to the Plaintiff, and of copies of the letters written by the Plaintiff. The Plaintiff's solicitors refused to produce any of them, as the Defendant had not delivered statement of defence. The Defendant then applied to the Court for production:—

Held, by *Chitty*, J., that production ought not to be ordered till a statement of defence had been delivered.

Held, on appeal, that production must be ordered at once of documents referred to in the pleadings unless some special reason against it can be

shewn, and that the Plaintiff must produce his books, with the usual liberty to seal up the parts other than the entries, and must also produce the letters written to himself, but that he could not be ordered to produce copies of letters written by himself, there being no reference to such copies in the statement of claim.

Webster v. *Whewall* (1) observed upon.

THE statement of claim (delivered on the 6th of November, 1882) alleged that at board meetings of the directors of the *Lion Fire Insurance Company, Limited*, it was arranged that a number of the shares held by French shareholders should be bought up and transferred to English shareholders, and the Plaintiff, a stockbroker, was requested to undertake the operation. That the directors agreed that each would take a number of the shares. That the Defendant applied to the Plaintiff to be allowed to take a share in the transaction, and that shortly before the 22nd of March, 1881, it was agreed between the Plaintiff, the Defendant, and a Mr. *Morris* that the transaction should be a joint one in which they should be interested in equal shares. That on the 26th of March, 1881, the Plaintiff entered into a contract with a large French shareholder for the purchase of 12,214 shares.

10. "On the same 26th of March, 1881, the Plaintiff wrote and sent to the said Mr. *Morris* a letter informing him that he had secured over 12,000 of the company's shares, and expected to get about 4000 more, and requesting him to communicate the matter to the Defendant."

11. "The said Mr. *Morris* shewed the letter to the Defendant, and at the Defendant's request, and with his concurrence, he, on or about the 27th day of March, 1881, wrote and sent to the Plaintiff a reply, which he by the said letter told the Plaintiff was to be treated as a joint letter of the Defendant and himself. The said letter contains the following passage: 'As regards participating in the operation' [meaning the operation in the company's shares] 'we both' [that is to say Mr. *Morris* and the Defendant] 'understood it to be a joint transaction on the same basis as the opera house affair.'"

The statement of claim then alleged the purchase by the Plaintiff of further shares, making up a total of 17,224, of which 8300 were taken by the directors, leaving 8924 shares, at a cost of £25,940.

(1) 15 Ch. D. 120.

C. A. 1883 QUILTER v. HEATLY.

13. "On or about the 30th of April, 1881, the Plaintiff carried over the said 8,924 shares in his books to the account of the said *John Morris*, the Defendant, and himself."

Further transactions were alleged, increasing the shares standing to the joint account to 12,801, at the purchase-money of £36,183, which had been provided by the Plaintiff.

16. "On the 29th of August, 1881, the Plaintiff wrote to the Defendant a letter asking him to send the Plaintiff £5000 as a contribution towards his share of the purchase-money. In reply the Defendant wrote and sent to the Plaintiff a letter, dated the 30th of August, 1881, in which he, in fact, admitted the agreement so made as aforesaid, but alleged that the Plaintiff had undertaken that there would be no money wanted." Some passages of this letter were set out.

The Plaintiff claimed a declaration that the Defendant was bound to accept a transfer of 4267 shares (being one third of the 12,801 shares), and to pay the Plaintiff £12,061 (being one third of the £36,183), and to repay to the Plaintiff calls which he had been obliged to pay on such 4267 shares, and an order giving effect to such declaration.

The Defendant on the day after the delivery of the statement of claim served the Plaintiff with notice to produce for his inspection: 1. "Copy letter of Plaintiff dated 26 March, 1881, to Mr. *Morris*, mentioned in par. 10." 2. Letter from *Morris* to Plaintiff of 27 March, 1881, referred to in par. 11. 3. "Books of Plaintiff mentioned in par. 13." 4. "Copy letter of 29 Aug. 1881, Plaintiff to Defendant." 5. Letter from Defendant to Plaintiff of 30 Aug. 1881, mentioned in par. 16.

On the following day the Plaintiff's solicitors replied: "As the Defendant has not yet delivered his statement of defence and is not yet entitled to discovery, we must object to produce the documents in question, and must leave you to make an application to the Court on the subject."

The Defendant accordingly took out a summons for inspection, which was heard before Mr. Justice *Chitty* in Chambers and refused. The Defendant then moved in Court for an order. The motion was heard on the 11th of January, 1883.

Crossley, Q.C., and *S. Hall*, in support of the motion.

Romer, Q.C., and *H. B. Buckley*, for the Plaintiff, relied on the decision of Mr. Justice *Denman* in *Webster* v. *Whewall* (1).

CHITTY, J.:—

The question is whether the Defendant is or is not entitled under the circumstances to an order for the inspection of the documents. [After referring to paragraphs 10 and 11 of the statement of claim His Lordship continued.] Paragraph 13 appears to me, as at present advised, to be wholly immaterial. Paragraph 16 sets out a letter which the Plaintiff wrote to the Defendant himself, and therefore, *primâ facie*, it is in the Defendant's own possession. The 17th rule of Order XXXI., under which this motion is made, gives jurisdiction to the Judge to make the order, but does not say in terms that the order is to be made as a matter of course, or that the Judge has not a discretion to make or refuse the order. Rules 15 and 16 of the same order may be read together, and they relate to the form of notice to be given and the time within which the production is to be made. But the important rule is the 14th, which substantially introduced a new practice, and, as I have heard Sir *George Jessel* say, its main object was to prevent fictitious deeds or documents being invented by the pleader and inserted in the statement of claim. Before the *Judicature Act* a different rule applied as to the answer, because that was on oath, but a bill of complaint was not sworn to, and the pleader sometimes invented deeds for the purpose of preventing the bill being demurrable. But I quite agree with the argument of the Defendant's counsel that the rule must be read fairly. The rule mentions no limit whatever as to the time within which the notice to produce may be given. The latter part of the rule puts on the party declining to comply with the notice the penalty of not afterwards being at liberty to put any such document in evidence on his behalf in such action or proceeding unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the action, or that he had some other sufficient cause for not complying with such notice. It has been argued that the latter part of rule 14 is imported into the 17th rule, so that when an application is made under that rule

(1) 15 Ch. D. 120.

C. A. 1883 QUILTER v. HEATLY. Chitty, J.

for ordinary inspection the Judge must consider whether the case falls within the exception mentioned at the end of rule 14. Assuming that to be so, and that the Judge ought to make the order unless the case is within such exception, the question is whether there is at the present moment any "other sufficient cause for not complying with such notice."

That has apparently been the subject of a decision by Mr. Justice *Denman* in *Webster* v. *Whewall* (1), and I think it my duty as a Judge of first instance not to depart from a decision of a Judge of co-ordinate jurisdiction unless I see very grave reasons for considering him to have been wrong. In that case production of a deed had been refused, and at the trial it was objected by the other party that the deed could not be made use of. Mr. Justice *Denman* held that the deed related to the plaintiff's title only, but he went on to say (2): "Even if that is not a sufficient reason for protection the current of decision is in favour of not allowing a defendant free access to documents or discovery from the plaintiff until he has put in a defence." The learned counsel for the Defendant have remarked that Mr. Justice *Denman* did not there draw any distinction between inspection and discovery. It, however, appears to me that he did, and that he referred to inspection under the term "free access." Then in as plain terms as can be the learned Judge says, "I hold this a 'sufficient cause' under rule 14." That is, he means that it is a sufficient cause for not complying with rule 14 that the defence is not put in. That may be a sufficient cause, and I think I must follow the judgment of Mr. Justice *Denman* to the extent of holding that I have a discretion under which it is now open to me to make or refuse the order, acting of course as well as I can on judicial principles. I think it is competent to a Judge to make the order under rule 14 at any time according to the express words, even before the defence is put in; but I think some fair ground should be shewn for requiring the plaintiff to shew his documents before the defence is put in. To my mind it is very material (especially in such a case as this) that a defendant should pledge himself to some line of defence before he sees these documents. If there were any ground for supposing or suggesting that the documents

(1) 15 Ch. D. 120. (2) 15 Ch. D. 121.

C. A. 1883 QUILTER v. HEATLY. Chitty, J.

did not exist, probably I should exercise the discretion differently; but in this case there appears no ground for imputing that the Plaintiff has invented these documents. On the contrary, one of them, as appears from the statement of claim, is in the custody of the Defendant unless he has destroyed it, and another should be in the custody of Mr. *Morris*. I reject entirely the argument that there will be a difficulty in framing the defence unless the documents are inspected. There will not be the slightest difficulty. The Defendant can traverse or not admit the documents, and if he chooses to renew the application after he has put in his defence and succeeds in getting an order, he will then be entitled to the usual affidavit of documents, which is a distinct matter. It seems to me under these circumstances that the order made in Chambers is right. Therefore I decline to discharge it, and refuse the application with costs.

G. M.

C. A.

The Defendant appealed, and the appeal was heard on the 17th of January, 1883.

Davey, Q.C., *Crossley*, Q.C., and *S. Hall*, for the Appellant:—

We have a right to production at once under Order XXXI., rules 14, 15, 16, of these documents which are referred to in the pleadings. It is important to a party to know the nature of a document referred to in the pleadings of the other party; if he finds it genuine and correctly stated, it may induce him to submit to the plaintiff's demand. Mr. Justice *Chitty* relied on *Webster* v. *Whewall* (1). We do not object to the decision in that case, but to the reasons given for it, which are inconsistent with *Bustros* v. *White* (2). There is no such rule as that production of a document cannot be had before a defence is put in without a special ground being shewn for its production.

Romer, Q.C., and *H. B. Buckley*, *contrà*:—

It is very undesirable that a defendant before putting in a defence should inspect the plaintiff's documents, and shape his defence according to them.

(1) 15 Ch. D. 120. (2) 1 Q. B. D. 423.

C. A. 1883 QUILTER v. HEATLY.

[JESSEL, M.R.:—It seems to be the very object of the rules referred to that the defendant should have power at once to see documents referred to in the statement of claim.]

We submit that a discovery will not be given to the Defendant before putting in a defence unless a special case is made. Then the application asks for production of two copies of letters. The Defendant cannot be entitled to that, for no copies of letters are referred to in the statement of claim.

Davey, in reply.

JESSEL, M.R.:—

I regret that an appeal has been necessary in this case, for the rule on which the Defendant relies and the right which he asserts are to my mind clear. Order XXXI., rule 14, provides that any party to an action or other proceeding shall be entitled at any time before the hearing to give notice to any other party in whose pleadings or affidavits reference is made to any document to produce such document for the inspection of the party giving the notice, or of his solicitor, and to permit him or them to take copies. Rule 16 provides for production within a limited time from the notice, and by rule 17 if the party served with the notice omits to give notice of a time for inspection, or objects to give inspection, the party desiring it may apply to the Judge for an order for inspection. That means that the applicant is to have such an order unless good cause to the contrary is shewn. It is suggested that although the terms of the rule are general it is sufficient for the plaintiff, in answer to such an application by a defendant to say that the defendant has not put in his defence. I cannot conceive that this is a sufficient answer. The defendant may say, "Your case depends partly on a set of documents which you may have set out incorrectly. I wish to see them. It may be that I have made admissions which will put me out of Court. I wish to see the documents to know whether I have made such admissions, and it is important for me to see them before I put in my defence." It is reason enough why the Defendant should be allowed to see them that the Plaintiff has made them part of his

statement of claim. As to items 2, 3, and 5, the order asked for by the Defendant appears to me to be of course.

As to items 1 and 4, which are copies of letters written by the Plaintiff, the case stands differently. If the summons had asked for the production of the letters themselves, the answer would almost certainly have been that the Plaintiff had not got them, and could not get them, which of course would have been a complete answer to the application as regards them. But the summons asks for the production of copies. The Plaintiff probably has copies, but that is not the question. He may have copies, but copies are not referred to in the statement of claim. The Defendant fails as to these copies, but that ought not to affect the costs of the appeal. There must be an order for production of items 2, 3, and 5, with the usual liberty to seal up such parts of the books as do not contain the entries referred to by the Plaintiff in his statement of claim.

The case of *Webster* v. *Whewall* (1) has been referred to, but I think only on account of a *dictum* contained in it. Speaking for myself I do not pay much attention to the *dicta* of modern Judges, as I consider it my duty to decide for myself. This, of course, does not apply to decisions of modern Judges, nor to old recognised *dicta* by eminent Judges. In *Webster* v. *Whewall* there is nothing but a *dictum* to help the Plaintiff. I think no Judge on the bench would have excluded in evidence the deed there in question, though he might not have given the same reasons for admitting it. I have not the least doubt that the conclusion arrived at was right, though there are in the judgment one or two *dicta* which had better have been differently worded.

LINDLEY, L.J.:—

There is a broad distinction between a general application for discovery of documents relating to the matters in question in the action and an application for production of documents referred to in the pleadings. The Judges endeavoured to check an abuse which appeared likely to arise in exhibiting interrogatories under Order XXXI., rule 1, whether they were needed or not. I took

(1) 15 Ch. D. 120.

C. A. 1883 QUILTER v. HEATLY. Lindley, L.J.

part in that endeavour, and would not allow a plaintiff to exhibit interrogatories without waiting to see whether there was any occasion for them. In *Mercier* v. *Cotton* (1) the Court of Appeal upheld the view that discovery was not to be given as a matter of course before a defence was put in. But as to documents referred to in the pleadings the case is different. The general rules as to discovery of documents are intended to give a party discovery of all documents relating to the case which are in his adversary's possession unless there is some sufficient ground for refusing production. Rules 14–17 of Order XXXI. are very differently expressed, and are confined to documents mentioned in the pleadings or affidavits. These rules were evidently intended to give the opposite party the same advantage as if the documents referred to had been fully set out in the pleadings. I cannot but think that Mr. Justice *Chitty* would have ordered production had it not been for the judgment in *Webster* v. *Whewall* (2). But we must look to what the Judge in that case had to deal with. An application for inspection of a document had been made which had not been acceded to. The case came on for trial, and the Defendant objected that by force of Order XXXI., rule 14, this document could not be admitted in evidence. Any Judge would have found some reason for admitting it. The Defendant had never applied to a Judge for an order for production, and the case in substance turned on this, that it was quite plain that the Defendant really did not require to see the document before the trial. I think the decision was right. The reasons given for it may be criticised, but no Judge would have come to a contrary decision. Mr. Justice *Chitty* appears to have been misled by expressions in the judgment which, I think, really do not apply to the case.

BOWEN, L.J.:—

The machinery for the production of documents is of two kinds. We first have Order XXXI., rule 12, which enables a party without filing any affidavit to apply for an order directing any other party to the action to make discovery on oath of the documents in his possession or power relating to any matter in question in

(1) 1 Q. B. D. 442. (2) 15 Ch. D. 120.

the action. We must remember what the practice was before this rule. By the *Common Law Procedure Acts* an affidavit of documents could not be applied for without tracing into the possession of the party against whom the application was made some document which the applicant had a right to see. This rule caused hardship, and one object of rule 12 was to enable a party to obtain discovery of documents without adducing evidence in support of the application. This might cause endless expense if used indiscriminately, and the Courts of the Common Law Division, rightly as I think, came to the conclusion that rule 12 was not to be applied wholesale, and directed that a plaintiff is not as of course entitled to get an affidavit of documents from the other side at as early a stage of the proceedings as he pleases. In some actions it is almost of course that a party should be allowed to get discovery at once. Thus in an action on a policy of marine insurance the underwriter can get it at once; and in some other cases the Courts have said that discovery may be required at an early stage, but as a general rule, discovery is not given before the issues are defined by the delivery of a statement of defence.

The present case comes under a different set of rules. Order XXXI., rule 14, provides for immediate production of any documents which a party has referred to in his pleadings or affidavits. The party against whom the application is made must produce them unless he can shew good cause why he should not. If he refuses, the party applying can go to the Judge, who may refuse the application if he sees good reason for so doing. What is the case here? I not only see no reason why it should be refused, but every reason why it should be granted. In my opinion the *onus* is on the refusing party, but if the *onus* were on the applicant I think he has discharged himself from it. Mr. Justice *Chitty* seems to have been misled by *Webster* v. *Whewall* (1). The decision in that case was no doubt right, but some of the expressions in the judgment are not quite correct.

Solicitors for Plaintiff: *C. & S. Harrison & Co.*
Solicitors for Defendant: *Last & Sons.*

(1) 15 Ch. D. 120.

H. C. J.

C. A.
1883
Jan. 22.

In re FRANK MILLS MINING COMPANY.

Cost-book Mine—Retiring Shareholder—Contribution.

In a company formed on the cost-book system the practice had been for a shareholder to be at liberty to retire on the terms that if the company was solvent he received from the company a sum of money equal to his rateable proportion of the excess of the assets above the liabilities, but if the company was insolvent he paid to the company his rateable proportion of the excess of the liabilities above the assets. In every case in which a shareholder had retired when the liabilities were in excess of the assets the purser in calculating the value of the assets had entered all the arrears of calls as good debts, and the shareholder retired on paying only his proportionate part of the excess of the liabilities over the assets according to the number of shares, without regard to the solvency or insolvency of the other shareholders.

C. gave notice to retire in November, 1879, but no account was made out shewing what he was to pay. In March, 1880, an order was made to wind up the company. The liquidator, in 1882, made out an account shewing what *C.* was to pay, and in estimating the assets omitted all arrears of calls owing by insolvent shareholders, and then calculated *C.*'s contribution by dividing the excess of liabilities over assets rateably among *C.* and the other solvent shareholders. The Vice-Warden of the Stannaries held that this was correct, and ordered payment by *C.* of the amount with which he was thus charged:—

Held, on appeal, that this decision was correct in principle, and that the fact that on all previous occasions the assets had been reckoned without any allowance for the insolvency of persons owing arrears of calls, and the contribution of the retiring shareholder ascertained without reference to the insolvency of any of the continuing shareholders, was not sufficient evidence of an agreement among the shareholders that the contribution of a retiring shareholder should be calculated on that footing.

The course of practice followed by an officer of a company is not so strong evidence of an agreement sanctioning that practice as a course of practice in an ordinary partnership of few members.

But, *held*, that *C.* was entitled to have the assets of the company valued on the footing of its being a going concern, which it was when he gave notice of retirement, and that the solvency of the persons who owed calls, and of the continuing shareholders, must be taken as matters stood at the date of the notice of retirement, and not at the time when the account was made out.

THIS company was formed on the cost-book principle for working a mine in *Devonshire* without any written regulations.

H. W. Clarke had been a holder of shares in the company for

many years prior to June, 1877, but on the 21st of that month he retired from the company. On the 4th of January, 1879, he became the holder of 110 shares, and continued to hold them till the 15th of November, 1879, when he gave notice to the purser to relinquish them. The number of shares at this time was 1279. It appeared that the practice of such companies was that when a shareholder retired by relinquishing his shares an account was made out by the purser shewing the assets and liabilities of the mine, and that if the balance was adverse the shareholder retired on paying to the purser his *pro ratâ* share of the balance. *Clarke* wrote to the purser asking for an account, but no account was sent him. On the 6th of March, 1880, an order was made in the Stannaries Court for winding up the company.

The liquidator, in April, 1882, filed an account between the company and *Clarke* for the purpose of shewing what was payable by *Clarke*. In estimating the assets of the company he deducted from £1960 10*s*., the amount of the arrears of calls made in 1878, the sum of £959 10*s*. as irrecoverable, and from £7692, the amount of arrears of calls made in 1879, the sum of £4068 as irrecoverable, and he inserted the amount of the valuation of plant at £1714 12*s*. The excess of liabilities over assets, as shewn by the account, was £8077 11*s*. 6*d*. He then excluded 678 shares as being held by insolvent persons, leaving 601 shares. He claimed from *Clarke* the payment of 110 equal 601st parts of the above excess of liabilities over assets.

Clarke alleged that some of the holders of the 678 shares were perfectly solvent at the date of his relinquishment. He also alleged, and it was admitted to be the fact, that some of them had made payments in respect of calls which were not included in the account.

A call of £40 per share had been made on the continuing shareholders, and more than enough had been received to discharge all the liabilities of the company. The liquidator was prepared to return a substantial part of the call.

It appeared that on all former relinquishments of shares by shareholders when the liabilities were in excess of the assets the arrears of calls had been entered in the accounts as good assets,

C. A. 1883 *In re* FRANK MILLS MINING COMPANY.

and the share of the outgoing shareholder had been calculated with reference only to the total number of shares, without regard to the solvency of the holders.

The Vice-Warden of the Stannaries, on the 20th of May, 1882, made an order on *Clarke* for payment of the amount claimed by the official liquidator. It was not established in evidence that any of the holders of the 678 excluded shares (except one who had gone into liquidation) were insolvent, or that nothing could be expected to be recovered from them, and it did not distinctly appear whether the plant, &c., of the company had been valued on the footing of the company being a going concern. It appeared that it had since been sold for upwards of £1600 apart from the mines.

Clarke appealed from this order, and the appeal was heard on the 22nd of January, 1883.

Higgins, Q.C., and *Ingle Joyce*, for the appeal:—

We do not dispute that in the absence of special contract regard must be had to whether the arrears of calls were good debts, and whether any of the shareholders were insolvent, but we say that the uniform course of dealing in the company establishes the existence of a special contract that in estimating what was to be paid by a shareholder on retirement regard should not be had to these circumstances. A general practice in a company establishes a rule. Supposing the Court to be against us on this, the calculation of the liquidator is, at all events, wrong in valuing the plant at breaking-up price, though the company was a going concern when the Appellant gave notice of retirement, and in not bringing into account sums which have since been received from persons treated in the account as not able to pay anything. There is no sufficient evidence of the insolvency of most of the shareholders whom the liquidator leaves out of his calculation, and there is none that any of them were insolvent when *Clarke's* notice was given. [*In re Bodmin United Mines Company* (1), *In re Prosper United Mining Company* (2), and *Fenn's Case* (3), were referred to.]

(1) 23 Beav. 370. (2) Law Rep. 7 Ch. 286.
(3) 4 D. M. & G. 285.

Whitehorne, Q.C., and *Northmore Lawrence*, *contrà*, admitted that all sums received must be accounted for, and were desired to confine themselves to the question as to the valuation of the plant, &c.

There is nothing to shew that the plant was valued at breaking-up price, and it must be assumed to have been properly valued unless there is evidence to the contrary.

JESSEL, M.R. :—

This appeal raises a question of great importance. I do not profess to know what the customs relating to mines on the cost-book system are, but they can, to some extent, be gathered from decided cases. It would appear from the case of *In re Prosper United Mining Company* (1) that such a company is in most respects a common partnership, but that there is a power for any partner to retire at any time upon terms. What are those terms? Put broadly they come to this, that if at the date of retirement the concern is insolvent, the retiring partner pays his share of the deficiency as if the concern were being wound up, but if the concern is solvent then he is entitled to receive his share of the surplus left on deducting the liabilities from the value of the assets. In either case, whether the company be solvent or insolvent, the valuation of the assets must be made on the footing of the company being a going concern. As to the retiring partner's share in the liabilities, if the concern were wound up, he would have to pay his share, having regard to the solvency or insolvency of the other shareholders. He would along with the other solvent shareholders have to make good to the creditors of the company what the insolvent shareholders could not pay. He must on retiring pay on the same footing. This is his position according to the case of *In re Prosper United Mining Company* and according to common sense. If this is the ordinary custom of cost-book mines, and if this is a company on the cost-book system, the only question is whether any agreement between the parties is shewn to have existed which takes the case out of the ordinary rule. In most mines under the cost-book system there are

(1) Law Rep. 7 Ch. 286.

C. A. 1883

In re FRANK MILLS MINING COMPANY.

Jessel, M.R.

written rules which more or less vary the custom, either by way of superseding it or adding to it. But in the absence of written rules there still may be a variation of the custom by agreement, and the question is how the existence of an agreement having that effect is to be ascertained.

I agree that an express contract is not necessary, and that a contract between the partners may be implied from the course of practice. The question then is whether in the present case there is sufficient evidence of an implied contract to vary the custom. It is said that there is, for that when a shareholder relinquished his shares the company being at the time insolvent, the settled practice was that the excess of liabilities over assets was divided by the number of shares, and what the retiring shareholder had to pay was ascertained by multiplying this quotient by the number of shares he held, without having any regard to the solvency of the continuing shareholders. It is said that this practice is sufficient evidence (and some evidence it, no doubt, is) that there was an agreement that the liability of a retiring shareholder should be ascertained in this way. On looking at the accounts it does appear that this course was always followed, and it also appears that in every case the arrears of calls were taken at their full amount as assets, which it is contended is evidence of a contract that the liability of the retiring shareholder should be ascertained without making allowance for any of the arrears being bad debts. This appears to me to be an absurd conclusion. The only other conclusion is that the purser blundered in making out his accounts. It must be remembered that the effect of a course of practice in a large company is very different from that of a course of practice in a common partnership, where every partner attends to the business and is privy to all that is done. The inference to be deduced from the mode in which the accounts have been made out is not nearly so strong in the former case as in the latter. It appears to me to be impossible in the case before us to draw from the course followed on former occasions the inference that there was a contract that bad debts should be treated as good, or that shareholders should be allowed to retire on paying a sum manifestly much less than they would

have to pay if the concern were wound up. I think the only conclusion to be drawn is that the purser blundered in making out the accounts. The order therefore appears to me to go on a right principle, but it cannot be supported as it stands, because no allowance is made for sums which have been paid by some of the shareholders who were treated in the account as not able to pay anything, and it does not have regard to the fact that the calculation must be made according to the state of affairs at the time when the notice of withdrawal was given, at which time some of the shareholders who are now insolvent may have been perfectly solvent.

It is said that the plan on which the purser made out the account is very convenient and simple, and that this is a reason why the shareholders may be supposed to have agreed to it. It is very convenient and simple, and that is the reason no doubt why the purser adopted it, but I do not think that a sufficient reason for holding that the continuing shareholders agreed that the accounts should be made out in a way so inconsistent with reason and principle. No balance-sheet can ever be made out for any useful purpose without distinguishing good, bad, and doubtful debts. You cannot properly put down a single debt as an asset without some consideration of the circumstances of the debtor.

There is another point to be considered. The Appellant says that he is entitled to have the assets valued as in a going concern, which this was when he gave notice of retirement. I think he is so entitled. The continuing shareholders took it as a going concern, and the assets must be valued on that footing. It has been disputed whether the liquidator has not valued the assets on this principle. I find, however, that he valued the plant at £1714, and that it has since been sold for upwards of £1600 as broken up. This to my mind is conclusive proof that he valued it at breaking-up price, for I never knew plant which was valued at £1700 as part of a going concern realize anything like £1600 when broken up.

I think that the costs should be left to be dealt with by the Vice-Warden, for it may turn out that the Appellant derives a substantial benefit from the appeal.

C. A.
1883
In re FRANK MILLS MINING COMPANY.

LINDLEY, L.J.:—

The substantial question in this appeal is one of considerable importance. If the Appellant had adduced evidence sufficiently cogent to convince us that it had been the universal practice of the company, understood by all its members, to estimate the liability of a retiring shareholder on the footing for which the Appellant contends, the case would stand in a very different position from that in which to my mind it does stand. I think that his evidence does not go far enough, and I think so for this reason. There is no documentary evidence, no resolution passed by a meeting of the shareholders, which can be referred to in support of the agreement for which the Appellant contends. We are asked to infer such an agreement merely from the mode in which the accounts have been kept by a purser, a mode not in accordance with the general law, nor, so far as we know, with the custom of cost-book mines. The general law is clear that where there is a joint and several liability you must in estimating the share which each person has to contribute strike out those who cannot pay anything. What the cost-book custom is we do not know except so far as we can gather it from reported cases. Some light is thrown upon it by the case of *In re Prosper United Mining Company* (1), and from that case I infer that the rule under the custom is the same as at common law. If the Appellant could prove an agreement between the shareholders inconsistent with this rule, the agreement would prevail, but it would require clear evidence, and I do not think that such an agreement can properly be inferred from the fact that the accounts were made out by the purser in a particular way upon the retirement of shareholders, without its being shewn that this mode of making the accounts was known to and approved by the body of shareholders.

BOWEN, L.J.:—

I am of the same opinion, and will only add a few words as to the argument founded on the practice of the company. I think there is a manifest fallacy in it. The Appellant in order to succeed must shew an agreement express or implied among the

(1) Law Rep. 7 Ch. 286.

shareholders of the company that shareholders should be allowed to retire on the terms which he is seeking to enforce. Express agreement it is admitted there is none, he therefore must shew an implied agreement. Such an agreement would be implied if there was a custom to that effect in cost-book mines. But no such custom is alleged. Then he says an agreement may be implied from the settled practice of a company. So there may —but what is the legal effect of the practice of a company. The fallacy lies in this—the past practice of the company is not the constitution of the company, but only evidence of its constitution, evidence liable to be rebutted. That clearly must be so because there is no express contract adopting the practice. A person taking shares does not thereby undertake to adopt everything the company has done, but only to adopt so much of the practice as the shareholders have agreed to. We must, therefore, consider how much of what has been done it is reasonable to suppose that the shareholders have adopted. Universal practice does not necessarily imply a contract by the shareholders to adopt. Suppose the purser, an officer who is not in daily intercourse with the shareholders, were to put £500 a year into his own pocket, and enter it in the accounts—and that this went on for years. Would it be reasonable to say that the company was bound by that course of proceeding? The past practice of a firm of two or three partners, each of whom knows everything that is done, stands on a very different footing from a course of practice adopted by an officer of a large company without communication with the shareholders.

Solicitors for Appellant: *J. E. Fox & Co.*
Solicitors for Respondent: *Gregory, Rowcliffes & Co.*

H. C. J.

C. A.
1882
FRY, J.
June 24;
July 1.
C. A.
1883
Feb. 9.

ATTORNEY-GENERAL *v.* VESTRY OF BERMONDSEY.

[1882 A. 1313.]

Vestry—Improper Expenditure of Rates—Injunction—Vestrymen made Parties for purpose of Costs—Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120) [*Revised Ed. Statutes, vol. xii. p.* 658].

A metropolitan vestry incorporated under the Act 18 & 19 Vict. c. 120, has no power to apply the rates in paying the expenses of a dinner or a ball, or other ceremonies in connection with the opening of a new vestry hall.

A vestry having passed resolutions authorizing such an expenditure, an action was brought by the Attorney-General, at the relation of a ratepayer, and by the ratepayer as Plaintiff, against the vestry and six of the vestrymen, who had proposed, or seconded, or voted for the resolutions, to restrain the proposed application of the rates. The statement of claim did not allege that any of the parish funds had been applied in the proposed way, but it alleged an intention on the part of the vestry so to apply the funds. No such intention was alleged on the part of the other Defendants, and under the Act they had no control over the funds. The statement of claim asked that the individual Defendants might pay the costs of the action, but costs were not asked against the vestry. On a motion for an interim injunction against the vestry only, an order for a perpetual injunction was consented to, but without costs. The other Defendants delivered no defences, and the Plaintiffs moved for judgment against them in default of pleading:—

Held, that the individual Defendants were not properly made parties for the purposes of obtaining costs from them, and that the action must be dismissed as against them.

Attorney-General v. *Compton* (1) distinguished.

Whether, if the vestry had been made liable for costs, they could have recovered them from the members who had induced them to act illegally, *quære*.

THIS action was brought by the Attorney-General at the relation of *Foster Mortimore*, a ratepayer of the parish of *Bermondsey*, and by *Mortimore* as Plaintiff, against the vestry of the parish and six of the vestrymen.

The vestry were incorporated under the provisions of the *Metropolis Local Management Act*, 1855, 18 & 19 Vict. c. 120.

The statement of claim alleged that it was the intention of the vestry, unless restrained by the injunction of the Court, to pay

(1) 1 Y. & C. (Ch.) 417.

out of the rates or parish funds in their hands the expenses of a dinner and a ball given to celebrate the opening of a new vestry hall in the parish, and certain other expenses of a similar nature. The statement of claim also alleged that resolutions authorizing the payment of these expenses out of the rates had been passed at meetings of the vestry; the resolutions having been proposed and seconded by some and supported by others of the Defendant vestrymen. It was also alleged that the vestry had no power to expend the rates in this way. It was not alleged that any of the funds had been in fact so applied, or that any of the individual Defendants intended so to apply them.

The Plaintiffs claimed an injunction to restrain the Defendants from paying or applying any portion of the rates or parish funds in or towards defraying the expenses of the celebration of the opening of the vestry hall, or of the dinner and ball; and that the Defendants other than the vestry might pay the costs of the action.

On the 27th of April, 1882, upon a motion by the Plaintiffs for an injunction, an order was, by the consent of the vestry, made, granting a perpetual injunction against them in the terms of the claim, but no order was made as to the costs of the action, nor was any order made against the other Defendants, no notice of the motion having been served on them.

The other Defendants delivered no statement of defence, and the action now came on upon a motion for judgment in default of pleading as against them.

The action was heard before Mr. Justice *Fry* on the 24th of June, 1882.

S. Dickinson, for the Plaintiffs:—

The individual Defendants made themselves parties to the illegal resolutions of the vestry by proposing them or voting for them, and they ought to pay the costs of the action. The vestry have admitted that they have no power to expend the rates in the way which was proposed, and it is clear that the *Metropolis Local Management Act* gives them no such power. The vestry could not be ordered to pay costs, for they would have no power to levy a rate to pay for that which was *ultrà vires*. The

C. A. 1883

ATTORNEY-GENERAL v. VESTRY OF BERMONDSEY.

Plaintiffs must therefore be entitled to recover their costs from the individual Defendants who assisted in leading the vestry to act illegally.

Russell Roberts, for one of the Defendants:—

It is the usual custom to open public buildings with some ceremony, and it was not improper to expend a small sum out of the rates in that way: *Hampson* v. *Price's Patent Candle Company* (1). At any rate, no case is made against me. Individual vestrymen ought not to be made Defendants to such an action. They have no corporate funds in their hands, and they have done nothing more than express an opinion in favour of the proposed expenditure. This is not a sufficient ground for making them pay costs.

Ingle Joyce, for the other five Defendants:—

The substantial question in the action has been decided in our absence by consent. We had no notice of the motion for an injunction. The object of the present motion is only to make us pay costs. It is not the practice of the Court to entertain an action merely on the question of costs when the substantial question has been decided: *Whalley* v. *Lord Suffield* (2).

Again, no equity is alleged against us, and we ought not to have been made parties. We have no funds in our hands. The corporate funds are in the hands of the treasurer, and we have no control over them except by our votes as members of the vestry. We are not in the position of directors or other officers of a company who have the funds of the company under their control, and we have not been parties to any fraud. There is no authority for making us parties to the action: *Mitford* on Pleadings (3); *Attwood* v. *Small* (4); *Marshall* v. *Sladden* (5); *Weise* v. *Wardle* (6); *Attorney-General* v. *Corporation of Batley* (7).

At any rate we could be liable to pay costs only in the character of sureties for the vestry, and if the vestry could have been ordered to pay costs at all, the Plaintiffs have consented to an

(1) 24 W. R. 754.
(2) 12 Beav. 402.
(3) 5th Ed. p. 186 and *seq.*
(4) 6 Cl. & F. 232.
(5) 7 Hare, 428.
(6) Law Rep. 19 Eq. 171.
(7) 26 L. T. (N.S.) 392.

order against them without costs, and have thus released us. If the vestry alone had been Defendants to the action, and an injunction had been granted against them without costs, could the Plaintiffs have maintained an action against us for the costs of the first action?

But in truth there is no right of action against a person who has merely advised a corporation to do wrong, and who has no corporate funds in his hands. And the *Metropolis Local Management Act* contains provisions for the audit of the accounts of the vestry, and the disallowance of improper payments.

Dickinson, in reply:—

The Defendants were actors in a breach of trust, and therefore they are proper parties, and are jointly and severally liable for the costs of the action: *Attorney-General* v. *Compton* (1). In such a case the individual members of a corporation are liable for the act of the corporation. The Defendants are bound to shew that the proposed application of the funds was proper.

[FRY, J.:—What control does the Act give them over the funds?]

There are no special provisions as to the expending of the money raised by rates, except such as may be implied from sect. 158, which provides that those moneys shall be paid over to the treasurer of the vestry or into a bank. The general principle is, that a corporation formed for a specific purpose can be restrained at the instance of the Attorney-General from applying its funds to other purposes: *Attorney-General* v. *Great Northern Railway Company* (2).

The Plaintiffs have not released the Defendants from their liability to pay costs. The vestry could not have been made to pay costs, because the act complained of was *ultrà vires*, and they could not be compelled to levy rates to pay for the costs of defending it. The act, being *ultrà vires*, was not the act of the vestry, but that of the individual wrongdoers who assumed to act in its name. The Defendants were really principals, not sureties. But, if they were only sureties, proceedings in the action have not

(1) 1 Y. & C. (Ch.) 417. (2) 1 Dr. & Sm. 154.

C. A. 1883

ATTORNEY-GENERAL v. VESTRY OF BERMONDSEY.

been stayed as against the vestry, and the Plaintiffs can still proceed against them for costs.

July 1. FRY, J.:—

This case comes on, as against the Defendants other than the vestry, upon a motion for judgment in default of pleading, and I have, therefore, to determine the questions that arise upon the allegations contained in the statement of claim. The question is whether I can order the Defendants other than the vestry to pay the costs of the action, or grant any other relief against them, or whether the action ought to be dismissed as against them.

The Attorney-General is acting at the relation of a ratepayer of the parish, and he sues the vestry and the other Defendants, who are members of the vestry, upon an allegation that the vestry intend to pay out of the rates certain expenses which are not properly payable out of them. The rights and duties of the vestry are regulated by the Act 18 & 19 Vict. c. 120, and under that Act it appears to me that the proposed application of the funds of the parish is in no way authorized. It was in substance proposed to pay the expenses of a ball and other ceremonies in connection with the opening of a new vestry hall. It was contended on behalf of one of the Defendants that such an expenditure of the funds is authorized, but I can find nothing in the Act which authorizes it. The Defendants are persons who took part, either as movers or seconders or supporters, in passing the resolutions which affected to sanction the proposed expenditure. The statement of claim alleges that it is the intention of the vestry to apply the parish funds in their hands in providing for this expenditure, and it prays that all the Defendants may be restrained from so doing, and that the Defendants other than the vestry may pay the costs of the action. With regard to the Defendants other than the vestry, there is no allegation of their intention to do anything at all; that allegation is confined to the vestry. It is natural and proper that this should be so, for the individual Defendants, except as forming part of the majority, have no control over the funds of the vestry. There is no allegation of any act on the part of the individual Defendants which can support an injunction, and no injunction can be granted against them.

The next question is, Can I order the Defendants other than the vestry to pay the Plaintiffs' costs of the action? They as individuals have no control over the funds of the parish. They are brought before the Court not as sureties for the payment of costs by the vestry, the principal Defendants, but as being primarily liable for the payment of costs. No relief except the payment of costs is now asked against them, and costs are not asked against the vestry. Can a person be properly made a party to an action simply for the purpose of making him pay the costs of the principal Defendant? As a general rule, certainly such a step cannot be taken. Can it be done in a case where the plaintiff is a ratepayer, and can say that he will be injured if the vestry are ordered to pay costs out of the rates? It may well be that, if the vestry had been ordered to pay costs, they might have been able to recover what they had paid from the Defendants who had led them astray, but it is plain that there can be no such right of indemnity when the vestry have not been made liable to pay any costs. And, if there were a right of indemnity, it would be a right in the vestry, not in the Plaintiffs. Unless there was some collusion, there could be no such right in any individual ratepayer. It appears to me that there is no ground upon which I can grant any relief against these Defendants in the shape either of an injunction or costs. But under the circumstances I cannot order the Plaintiffs to pay the costs of the persons who were the authors of the mischief.

I must make one other observation. The case of the *Attorney-General* v. *Compton* (1) was pressed on me by Mr. *Dickinson* as an authority for ordering the Defendants to pay costs, but when it is carefully looked at, I think it is not an authority in point. There the individual corporators had so far led the corporation astray that they had paid money away out of their coffers. Somebody must repay it, and the relief prayed was that the individual defendants should recoup the money. That is in no way parallel to the present case, where no money has been paid away by the corporation, and no money has to be got back.

I therefore dismiss the action as against the Defendants other than the vestry, but without costs.

W. L. C.

(1) 1 Y. & C. (Ch.) 417.

C. A.
1883
ATTORNEY-GENERAL v. VESTRY OF BERMONDSEY.
C. A.

From this judgment the Plaintiffs appealed. The appeal was heard on the 9th of February, 1883.

Dickinson, for the Appellants, cited *Attorney-General* v. *Compton* (1).

Ingle Joyce, for five of the Defendants, and

Russell Roberts, for the remaining Defendant, were not called on.

JESSEL, M.R. :—

This is an appeal from Mr. Justice *Fry* which raises an important question which the learned Judge did not decide. He dismissed the action against these Defendants on technical grounds—I do not say he was wrong in doing so—which prevented him from deciding the case on the larger and more important ground. There is in the statement of claim some sort of allegation that the Defendants took part in passing the resolutions which involved a misappropriation of the rates. Well, no doubt vestries have no right to give balls and dinners out of the rates, and they have been restrained, and properly so, from so doing by injunction. But the Attorney-General has sued not only the vestry, but these half-dozen gentlemen who it may be taken voted, though that was not proved as to all of them, on these illegal resolutions. It may be also taken that they formed part of the majority which carried the resolutions. I am not going to decide the case upon the bare technicality that though it is alleged that they, or some of them, moved or seconded the resolutions, there is no allegation that they actually voted for them. Taking it most favourably for the Appellants that it was established that these vestrymen formed part of the majority which voted for and carried this illegal application of the parish funds, are they proper parties to the action when the money has not been actually misapplied? If it had been misapplied, then, of course, they would be liable, and they would be bound, whether in their corporate capacity or not, to repay the money so misapplied. When that has not been done, and yet they are sued by the Attorney-General in order to prevent it

(1) 1 Y. & C. (Ch.) 417.

from being done, it appears to me that one of two things must be alleged, either that those persons actually threatened to do it, or that they have control over the funds and have power to do the act. If these Defendants had the control of the funds independently of their being vestrymen, it might have been different; but that is not the case. Why, then, were they made parties to the action? For no other reason but to make them pay the costs of the action. But the parties properly liable to pay the costs would be those who threatened to misapply the money, that is to say, the vestry. The reason, however, why it was not asked that the vestry should pay the costs was that the Plaintiff *Mortimore*, who was himself a ratepayer, would be one of those who would have to pay. In a recent case before the Court, *Mathias* v. *Yetts* (1), I made reference to the old rule of what was called the three A's, under which an attorney, an agent, or an arbitrator might be added as a party in order that he might be made liable to the costs of the suit. But ever since Lord *Cottenham's* time it has been held that the rule ought not to be extended so as to be applied to the case of corporations or vestrymen. If the Appellants are right these Defendants would be liable to indemnify the vestry against the consequences of the illegal acts. But that liability cannot be investigated in this action, because the other members of the vestry have not been made parties, and therefore complete justice cannot be done. If the Defendants are liable at all that liability ought to be tried in an action by the vestry. Upon the whole, therefore, I cannot say that it would be just to make these Defendants pay the costs of the action, which, in my opinion, ought to have been dismissed as against them with costs.

LINDLEY, L.J.:—

I am of the same opinion. This is an interesting experiment, but it is an experiment which has failed; and if as an individual vestryman I had been made a Defendant to this action, I should probably have put in a demurrer, and, I think, with good prospect of success. The question really is, whether it is right to bring an action against individual members of a vestry simply because they

(1) 46 L. T. (N.S.) 497.

C. A. 1883 ATTORNEY-GENERAL v. VESTRY OF BERMONDSEY.

have voted for an illegal application of the rates. It is not alleged that they have any control over the money *de facto*. It is said they were active participators in a breach of public duty, but the act was never done. So far as the action went to restrain the proposed illegal application of the rates by the vestry it was right; but so far as it sought to make the individual members of the vestry liable for costs it was wrong, and must be dismissed.

BOWEN, L.J.:—

I also am of the same opinion. The Defendants ought not to have been joined as parties in this action so far as related to anything that they were doing, for the best of reasons, that they were not doing anything. They are simply accused of assenting by a vote to a proposed improper expenditure of the vestry. There is no relief asked against them personally except the payment of costs. Although I am not so well acquainted as the Master of the Rolls with the rule of the three A's, I am satisfied that in this case no costs ought to be given against these Defendants.

Russell Roberts asked that the action might be dismissed with costs.

JESSEL, M.R.:—We cannot on this appeal alter the judgment in the way suggested. We can only dismiss the appeal with costs.

Solicitors for Plaintiffs: *Wilkinson & Drew.*
Solicitors for Defendants: *R. Chapman; J. Harrison.*

M. W.

Ex parte GRIFFITH. *In re* WILCOXON.

C. A.
1883
Feb. 8, 15.

Fraudulent Preference—Statutory Definition—Value of Old Decisions—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 92.

In determining whether a transaction amounts to a fraudulent preference the Court ought now to have regard simply to the statutory definition contained in sect. 92 of the *Bankruptcy Act*, 1869.

The decisions on the subject before the Act may be useful as guides, but the standards laid down in them must not be substituted for that which is laid down in the Act.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

Arthur Wilcoxon carried on business as a wholesale cabinet maker and upholsterer, in *London*, under the firm of *A. & R. Wilcoxon*. *John Griffith* had been for more than thirty years in the employment of the firm as a traveller. In the year 1875 there was a considerable arrear of salary due to him, and he asked for some security for the debt, and on the 17th of April, 1875, *A. Wilcoxon* gave him a written authority to retain the amount due to him out of his receipts from the customers of the firm, "now and for the future, until we give you notice to the contrary." Notwithstanding this authority the debt due from the firm to *Griffith* continued to increase, and on the 27th of September, 1879, the firm, at his request, gave him another written authority, expressed in similar terms, to retain his debt out of his receipts from customers of the firm. The arrears due to him still went on increasing, until on the 30th of June, 1881, the balance due to him amounted to £2304.

On the 29th of June, 1881 (a Wednesday), while *Griffith* was absent on a journey for the firm, *Wilcoxon* wrote to him as follows:—

"I think your immediate presence in *London* is very desirable, as matters are in a very grave position as regards money, and we can hardly say what steps we may find it advisable to take. Even if we meet our usual Saturday's engagements we have other pecuniary claims we cannot see our way to meet, as also the acceptances maturing on the 4th prox. (Monday)."

C. A. 1883 *Ex parte* GRIFFITH. *In re* WILCOXON.

On the receipt of this letter, *Griffith* returned to *London*, and had several interviews with *Wilcoxon*, at which the firm's debt to *Griffith* was discussed. *Griffith* asked *Wilcoxon* to give him an authority to collect certain specified debts due from customers of the firm, amounting to about £2200. *Wilcoxon* at first refused to do this, but ultimately on the 14th of July he signed a document authorizing *Griffith* to collect certain specified debts due to the firm from customers who were named, amounting in the whole to £1044, "in part payment of our indebtedness to you. This is a continuance of our authority, dated 27th of September, 1879." Notice of this authority was given at once to the customers from whom the specified debts were due. On the 15th of July, *Wilcoxon* signed a liquidation petition, and the petition was filed on the 18th of July.

On the 9th of August the creditors resolved on a liquidation by arrangement, and appointed a trustee. *Griffith* received out of the debts which had been assigned to him by the document of the 14th of July, sums amounting to £722. The trustee in the liquidation applied to the Court for an order that *Griffith* should pay this sum over to him, on the ground that the giving of the document of the 14th of July amounted to a fraudulent preference. The Registrar held that it was a fraudulent preference, and ordered *Griffith* to pay the £722 to the trustee.

Griffith appealed.

Winslow, Q.C., and *Herbert Reed*, for the Appellant:—

The letter of the 29th of June, 1881, was a revocation of the previous authority to *Griffith* to collect debts due from customers. The new authority or assignment given by the letter of the 14th of July was given in consequence of pressure by *Griffith*, and in discharge of a supposed moral obligation towards him, and this prevents it from being a fraudulent preference. If a creditor knows that his debtor is insolvent and about to become a bankrupt, that is the strongest possible reason for pressing him for payment. It is sufficient if the assignment was not the spontaneous act of the debtor: *Johnson* v. *Fesemeyer* (1). A *bonâ fide* demand for payment without pressure has been held sufficient: *Mogg* v.

(1) 3 De G. & J. 13.

Baker (1); *Bills* v. *Smith* (2); *Ex parte Topham* (3). The old law on the subject has not been altered by sect. 92: *Ex parte Tempest* (4). If there is a mixed motive on the part of the debtor, if he does not act with the sole view of preferring the creditor, the transaction cannot be impeached: *Brown* v. *Kempton* (5).

[JESSEL, M.R., referred to *Ex parte Bolland* (6).]

Vacher v. *Cocks* (7) is very like the present case. There *Bayley*, J., said (8), "The question of fraudulent preference depends on what passes in the mind of the party making the payments at the time when they are made: if he acts in pursuance of a contract or engagement, or otherwise under such circumstances that he cannot have a choice, the payments are evidently not the result of preference."

[JESSEL, M.R.:—You must shew that the bankrupt acted under some coercion, that there was something to control his will.]

If there is something to move his will that is enough. *Ex parte Hall* (9), on which the Registrar based his decision, is distinguishable. In order that the payment should be invalid it must, as under the old law, have been voluntary and made with the sole view of preferring the creditor. Here both parties thought that they were carrying out the old agreement.

Sidney Woolf, and *E. Montefiore Micholls*, for the trustee, were not heard.

JESSEL, M.R.:—

In my opinion all the argument has been completely thrown away. The case is a very plain one and is within the very words of the statute. In the first place, there was no obligation upon *Wilcoxon* to assign these debts at the time when he did so, and he did not do it until the very day before his petition was signed. Under what circumstances did he make the assignment? He knew that he

(1) 4 M. & W. 348.
(2) 6 B. & S. 314.
(3) Law Rep. 8 Ch. 614.
(4) Ibid. 6 Ch. 70.
(5) 19 L. J. (C.P.) 169.
(6) Law Rep. 7 Ch. 24.
(7) 1 B. & Ad. 145.
(8) Ibid. 152.
(9) 19 Ch. D. 580.

C. A. 1883 *Ex parte* GRIFFITH. *In re* WILCOXON. Jessel, M.R.

had become indebted to the Appellant in a large sum, because he had previously given him authority to collect certain debts (not specifically these debts) and to retain out of them the amount due to him. He is then going to stop payment, and he writes a letter to *Griffith*, who was then on a journey, telling him in effect, as plainly as possible, "I can't go on. Come up to London immediately. I can't meet my bills, and I cannot pay even the ordinary weekly wages; therefore you must at once come to *London*." Now, first of all, the argument has been put upon this ground, that that letter was a revocation of the authority previously given to *Griffith* to retain his debt out of moneys collected by him, because an authority was given to him to collect other moneys. It was certainly not a revocation of the prior authority. Well, in compliance with that letter *Griffith* comes to *London*, and he finds that *Wilcoxon's* affairs are in a hopeless state. A discussion appears to have taken place between *Griffith* and *Wilcoxon* in which *Griffith* says, "Can't you give me preference" (that is what it comes to), and he asks him to assign these debts over to him as a security for the amount owing to him. There is no pretence, so far as I can find, for saying that that was anything more than a request by *Griffith* for a preference. It is said that *Wilcoxon* refused to comply with the request; I suppose he said, In the present state of my affairs I can't pay you. But just on the eve of signing his petition, the very day before, he does assign those debts to *Griffith*. For what purpose? Clearly to give him a preference. I say, sitting as a jury, that the learned Registrar was quite right in coming to the conclusion that the mind of *Wilcoxon* was influenced, not by the demand of *Griffith* for a preference, but by his desire to accede to the demand and to give him a preference. That is within the very words of sect. 92. I am not going into a long discussion of the question whether the old law on the subject has been altered by sect. 92. If we are of opinion that the thing was done with a view of giving a preference to this creditor over the other creditors, why are we not to apply sect. 92. If the assignment was made with a different view it would not be within the statute. If it was made with a view to prefer the creditor and also with some additional view it may be that it is not within the statute. But the additional motive may

have been so trifling that it ought not to be taken into account at all. I think it is far better that we should in all these cases look to the intention of the clause in the Act, and not entangle ourselves in an inquiry as to the precise views and intentions of the parties in order to see what was the motive of the transaction and what the law was before the statute. The law has now been put into a definite shape and form, and our duty is to construe the words of the Act. I think, however, that even under the old law this would have been a plain case of fraudulent preference. I am of opinion that the appeal should be dismissed.

LINDLEY, L.J.:—

I am of the same opinion. This case illustrates in a remarkable way the danger that would result if we endeavoured to substitute one standard for another in the administration of the law. What we have to consider is the true construction of sect. 92. I emphatically protest against being led away from the words of the section by any argument that the standard which the Legislature has laid down is equivalent to the standard of the old law. It may be so, but the language is different, and our duty is to construe that language. I by no means wish to be understood as expressing an opinion that the old decisions are of no value as guides; of course they are; I only protest against their being substituted for the statute. Let us keep the enactment before us, and regard those decisions so far only as they are in accordance with it and throw light upon it.

Now with respect to the case before us, the evidence appears to me to lead to one conclusion and one only, and that is that the charge which was given by *Wilcoxon* on the 14th of July, 1881, was given by him with a view to give *Griffith* a preference over the other creditors, and I come to that conclusion for this reason. It is admitted that *Griffith* was more or less pressing *Wilcoxon* for a security when they met. To what extent *Wilcoxon* may have been influenced by his importunities it is impossible to guess or to infer. But *Wilcoxon's* letter of the 29th of June, 1881, which brought *Griffith* up to town, throws a flood of light upon the transaction. Taking that letter into consideration, and not being led away on a false scent by an inquiry whether there

C. A. 1883 *Ex parte* GRIFFITH. *In re* WILCOXON.

was *bonâ fide* pressure at that time, taking that letter as part of the transaction, and bearing in mind its relation to that which took place afterwards, I am driven irresistibly to the conclusion that the security was given by *Wilcoxon* with a view to prefer *Griffith*.

BOWEN, L.J.:—

I am of the same opinion, and if I say anything at all it is only with the view of paying proper respect to the acute and ingenious arguments which have been brought forward by Mr. *Winslow* and Mr. *Reed*, but which have not convinced me that we ought to accept the propositions put forward on behalf of the Appellant. I should like to pause in the current of judicial decisions for the last fifteen years on the subject of fraudulent preference and to take note, so to say, of the position in which the Court finds itself in relation to this subject.

Everybody knows that originally there was no express statutory enactment in regard to fraudulent preference. But from the time of Lord *Mansfield* down to 1869 the Courts considered that certain transfers of property were frauds upon the bankruptcy law, though there was no statutory enactment upon the subject. Then came the *Bankruptcy Act* of 1869, and in that Act it was for the first time explained what was meant by fraudulent preference, and the Act uses very definite language. Now what is the method which has been pursued by judicial decisions since? I think it is very unfortunate. I do not say that it has led to any wrong decision, but I think that it has had a tendency to draw one's mind away from the true question. The first thing which the Courts did was to discuss the question whether the Act had altered the old law and introduced an entirely new law, and they came to the conclusion that it had not altered the old law. Then began what I may call the old metaphysical exploration of the motives of people. The Courts first adopted a supposed verbal equivalent for the words of the statute, and then pursued the old inquiries as to what were the deductions which followed from the adoption of this verbal equivalent. And so we have been drawn into questions of pressure and volition, and at length in the present case we have got into a discussion as to

C. A.
1883
Ex parte GRIFFITH.
In re WILCOXON.
Bowen, L.J.

what is the motive of a motive, whatever that may mean. I think it is a wiser policy to go back, as I do, in a humble spirit to the words of the statute, and, without discussing motives of motives, inquire whether the transaction was entered into with a view to give the one creditor a preference over the others. There is no question to my mind that this particular assignment was made with a view of giving this creditor a preference. But that, as the Master of the Rolls has said, may not be enough, and I go further and say that the assignment was made with *the* view of preferring this creditor, and, to give the *coup de grace* to it, I say, sitting as a juryman, that it was made with *the sole* view of giving this creditor a preference over every other creditor. That being so, I think that the Registrar's decision was right.

Appeal dismissed with costs.

Solicitors for Appellant: *Reed, Lovell, & Reed.*
Solicitor for Trustee: *H. Montagu.*

W. L. C.

Ex parte IZARD. *In re* BUSHELL. (No. 1.)

C. A.
1883
March 1.

Receiver and Manager under Liquidation Petition — Charges — Taxation — Money advanced without Authority of Court—Right to Indemnity—Bankruptcy Rules, 1871, *rr.* 5, 6, 7.

Under rule 5 of the *Bankruptcy Rules*, 1871, the charges of a receiver and manager of a business for disbursements out of pocket (*e.g.*, travelling expenses and salaries of assistants) are liable to taxation.

A receiver and manager of a business who desires to advance money of his own for the purposes of the business may, before doing so, apply to the Court for its authority, and the Court will, as a general rule, allow him interest at 5 per cent. on the amount which it authorizes him to advance, and will give him a charge on the debtor's assets for the advance and the interest.

If the receiver and manager advances money without such a previous authority, he is entitled to an indemnity out of the assets, but he cannot obtain a personal order against the trustee for payment.

THIS was an appeal from a decision of Mr. Registrar *Hazlitt*, acting as Chief Judge in Bankruptcy.

C. A. 1883 *Ex parte* IZARD. *In re* BUSHELL. (No. 1.)

A. T. Bushell carried on business as a tea and coffee merchant in *London*, and also at *Liverpool* and a number of other towns in *England* and *Scotland*. On the 8th of September, 1882, he filed a liquidation petition, and on the following day an order was made appointing *H. S. Foster* receiver of the debtor's property and manager of his business. In pursuance of this order *Foster* carried on the business at various shops of the debtor, and for the purposes of the business he ordered goods on his own credit. He had not obtained any previous authority from the Court to advance money of his own to pay for the goods. On the 5th of October, 1882, the first meeting of the creditors under the petition was held, when a liquidation by arrangement was resolved upon, and *W. Izard* was appointed trustee, and on the 7th of October he took possession of the debtor's assets at most of his shops. On the 13th of October an order was made by the Court directing *Foster* to deliver up to the trustee the leases of the debtor's shops which were in his possession, the trustee undertaking to pay to *Foster* "out of the present or first trust moneys coming into his hands" such sum or sums of money as might be found due to him as receiver and manager on the taking of his accounts, such accounts to be taken and vouched forthwith, the question of his costs being reserved. *Foster* then delivered to the trustee an account of his receipts and disbursements during the period of his receivership. This account shewed that a balance of £206 11*s.* 9*d.* was due to him, beyond the amount of the sums which he had received. The trustee objected to pay this balance to the extent of £178 4*s.* 9*d.*, and insisted that the items of which that sum consisted ought, under rule 5 (1) of the *Bankruptcy Rules*, 1871, to be

(1) Rule 5. "All bills and charges of attorneys, receivers, managers, accountants, auctioneers, brokers, and other persons not being trustees, in matters of liquidation, shall be taxed by the proper officer of the Court, and no payments in respect of such bills or charges shall be allowed in the accounts of a trustee, without due proof of such taxation having been made. No payment shall be allowed in respect of the remuneration of a trustee in liquidation, except on the allocatur of the taxing officer, as being in accordance with the determination of the creditors thereon."

Rule 6. "Where in bankruptcy or liquidation a receiver or manager is continued as trustee, the remuneration of the trustee at the rate determined on shall commence as from the date of his appointment as receiver or

referred to the Taxing Master for taxation. The items were as follows:—

	£	s.	d.
" Possession money for one of the shops	6	5	0
" Salaries of two persons whom the receiver had specially employed to travel about and inspect the management of the shops	60	18	0
" Travelling expenses of those persons	60	4	9
" Travelling expenses of the receiver himself . .	42	9	0
" Stamps and telegrams	8	8	0
" Total	178	4	9"

The account did not include any charge for *Foster's* remuneration as receiver and manager.

Foster also claimed to be paid by the trustee a sum of £558 16*s.* 9*d.*, which was due from him to persons who had supplied goods for the purposes of the business on his personal credit, and the payment of which those persons were demanding from him. On the 19th of December, 1882, the Registrar, on the application of *Foster*, made an order directing the trustee forthwith to pay him the sum of £206 11*s.* 9*d.*, and also to pay the sum of £558 16*s.* 9*d.* to the persons respectively who had supplied the goods. And it was ordered that the trustee should pay *Foster's* costs of the application. When the order of the 13th of October was made the trustee had some assets of the debtor in his hands, but before the order of the 19th of December was made he had paid the greater part of those assets away to prevent distresses for rent being levied.

The trustee appealed from the order of the 19th of December.

Cooper Willis, Q.C., and *F. Cooper Willis*, for the Appellant, relied upon rule 5.

---

manager, and shall be assessed accordingly; and no other than the aforesaid remuneration shall be made to the trustee for his services as receiver or manager."

Rule 7. "Where the receiver or manager is not continued as trustee, or is continued as trustee, but without remuneration, he shall be allowed out of the estate such sum for his services as receiver or manager as the taxing officer of the Court shall, having regard to the views of the trustee and committee of inspection (if any) thereon think fit."

C. A.
1883
Ex parte IZARD.
In re BUSHELL. (No. 1.)

Winslow, Q.C., and *Sidney Woolf*, for the Receiver:—

Rule 5 does not mean that the payments made out of pocket by the receiver are to be taxed, but only his charge for his own remuneration. The receiver had a lien on the leases which he delivered up, for his expenses out of pocket.

[JESSEL, M.R.:—No, he had no lien. He is an officer of the Court, and relies on the Court to provide for the payment of what is due to him.]

By the order of the 13th of October the trustee undertook to pay to the receiver what might be found due to him on the taking of his accounts.

[JESSEL, M.R.:—That means on taking his accounts according to the Rules in Bankruptcy.]

The Taxing-Master is only an officer of the Court, and the Registrar, acting as Judge, was entitled to tax the bill himself: *Ex parte Ditton* (1). He in fact went carefully into the items.

[JESSEL, M.R.:—The Registrar cannot set aside the Rules. If the Court settles a solicitor's bill it orders it to be paid without taxation. *Ex parte Ditton* has no application. There the solicitor had not sent in a signed bill, and could have no right whatever to taxation.]

It shews that the Court can itself do that which the Taxing-Master might do.

[JESSEL, M.R.:—The Court cannot overrule the General Rules.]

The Rules are merely directory. Rule 7 only explains rule 5, and shews that it applies to the receiver's remuneration. As to the other part of the order which directs the trustee to pay for the goods, he has already complied with it.

[JESSEL, M.R.:—Still you must shew that it was a right order.]

The goods in question were ordered in the last week of the receiver's management. The trustee on his appointment received the takings of the shops for that week, and also obtained possession of all the remaining stock-in-trade. He has thus had the

(1) 13 Ch. D. 318.

benefit of the goods which were purchased, and he ought to pay for them. Indeed, his undertaking, contained in the order of the 13th of October, extends to that.

JESSEL, M.R.:—

The Registrar's order is complained of upon two grounds. First, it is said that it ought not to have ordered the £178 4*s.* 9*d.* to be paid without a previous taxation. That sum consists of the travelling expenses of the receiver himself, and of the salaries and travelling expenses of the persons whom he specially engaged to travel about and inspect the mode of carrying on the business at the different shops of the debtor. I cannot imagine any more proper description of these payments than "charges of the receiver." They are charges made by him partly for himself personally, and partly for persons specially employed by him for the purpose which I have mentioned. The words of rule 5 are plain, and yet it is absolutely and boldly put forward in argument that, as regards a receiver and manager, the rule is to be limited to his charge for his own remuneration. But in the rule the charges of a receiver and manager are lumped together with those of solicitors, accountants, auctioneers, and brokers. We know that the bills of solicitors are liable to taxation as regards their charges for disbursements out of pocket, and it often happens that sums actually paid by them are disallowed on taxation. There is no reason for making any distinction between the charges of a solicitor and the charges of any of the other persons mentioned in rule 5. In order to shew that the argument is absolutely without foundation it is only necessary to refer to rules 6 and 7, which clearly shew that rule 5 does not apply to a receiver's remuneration, it being specially provided for by rules 6 and 7.

As to the second part of the Registrar's order, which directs the trustee to pay the price of the goods which the receiver ordered on his own credit, it is a personal order on the trustee to pay the amount. The goods were supplied to the receiver and manager to enable him to carry on the business. No doubt he is entitled to be indemnified out of the debtor's estate, but that is no reason for making a personal order against

C. A. 1883 *Ex parte* IZARD. *In re* BUSHELL. (No. 1.) Jessel, M.R.

the trustee. If a receiver and manager, either in Chancery or Bankruptcy, chooses to advance money of his own without the previous authority of the Court, he can only look to the estate for indemnity. The practice in the Chancery Division is for a receiver and manager before he advances money to apply to the Court for its authority to do so, and when the Court gives him authority it generally allows him interest at 5 per cent. on the sum which it authorizes him to advance, and gives him a charge on the assets for that sum and the interest. Rule 299 of the Bankruptcy Rules of 1870 provides that "the Court shall have the same power and discretion as to the appointment, remuneration, and removal of the receiver and manager, and in the settlement of his accounts, and in directing the appropriation of moneys or property in his hands, as is exercised by the Court of Chancery, or as near thereto as may be." Therefore the Court of Bankruptcy can do that which the Chancery Division could do. If the receiver and manager makes an advance of money for the purposes of the business without the previous authority of the Court, he is still entitled to an indemnity out of the estate, but it is impossible to give him a personal order for payment by the trustee. The only order which could be made would be that the trustee should pay him out of the assets, if he had available assets in his hands. In the present case there is no evidence that when the order appealed from was made the trustee had any assets in his hands; the only evidence is that he had previously had assets in his hands, and that he had paid them away. It is said that the undertaking which the trustee gave by the order of the 13th of October applied to the £558. But that undertaking was to pay sums which might be found due to the receiver, and when the order of the 19th of December was made the £558 was not due to the receiver because he had not paid it. Therefore it was not within the undertaking. The Registrar's order must be discharged, and there must be a direction to tax the £178. As to the costs of the application, there appears to have been great laxity in the practice of the Bankruptcy Court, and this may have misled the receiver. Therefore no costs will be given against him either in this Court or in the Court below. The trustee will take his costs out of the estate.

C. A.
1882
Ex parte
IZARD.
In re
BUSHELL.
(No. 1.)

BAGGALLAY, L.J.:—

I agree, and for the same reasons.

LINDLEY, L.J.:—

So do I.

Solicitors for Trustee: *Piesse & Son.*
Solicitors for Receiver: *Hindson Miller & Vernon.*

W. L. C.

MUNDY *v.* DUKE OF RUTLAND.

C. A.
1882
KAY, J.
March 24, 25, 27, 28, 30.
C. A.
Nov. 27, 28, 29.
1883
March 17.

[1880 M. 60.]

Mining Lease—Covenant to leave Barriers—Support for underlying Strata.

The owner of land under which there were several strata of coal, demised one of the upper strata to the Plaintiff, reserving to himself and his lessees the right of working any coal not included in that demise, and the same powers and privileges with respect to such last-mentioned coal as if that demise had not been made: provided always, that in exercising such powers and privileges the working of the coal then demised should not be prevented or unnecessarily interfered with, and that compensation should be made to the Plaintiff for any necessary interference with the workings.

The landowner afterwards demised some of the strata of coal, underlying the coal demised to the Plaintiff, to the *M.* company. The Plaintiff brought an action for an injunction against the landowner and the company:—

Held, by *Kay*, J., on the construction of the lease, that working under a barrier between the demised coal and an adjoining worked-out mine, in such a way as might probably endanger the barrier, and thereby let in a sufficiently large quantity of water to delay and impede the working of the upper strata, was an 'unnecessary interference" within the meaning of the proviso in the lease.

Held, by the Court of Appeal, that the proviso in the lease was unintelligible and could not determine the rights of the parties: that if a lessor wished to reserve rights in derogation of his grant, he must do so in plain terms: and that on that ground the Plaintiff was entitled to an injunction if he could prove that the works threatened by the Defendants would in all probability affect the security of his mine. Further evidence was directed on this point; and the Court ultimately granted the injunction.

BY a lease, dated the 19th of January, 1866, and made between the Defendant, the Duke of *Rutland*, of the first part, *Alfred Miller Mundy* (since deceased) of the second part, and Sir *H. S.*

C. A. 1883 MUNDY v. DUKE OF RUTLAND.

Wilmot (since deceased) and the Plaintiff, *Lorenzo Hall*, of the third part, two seams or beds of coal known as the *Deep Soft* coal and the *Deep Hard* coal under the land in the parishes of *Ilkeston* and *Cotmanhay*, in the county of *Derby*, and also all such parts of the seam of coal called the *Roof* coal as lie so near the deep soft coal as to be worked therewith, together with full power to work, raise, and carry away the coal thereby demised, were demised by the Defendant, the Duke of *Rutland*, unto Sir *H. Wilmot* and the Plaintiff, *Lorenzo Hall*, their executors, administrators, and assigns, for the term of 40½ years from the 25th of March, 1862, at a certain rent of £500 a year, and at an acreage rent for *Deep Soft* coal of £50 per acre, and at an acreage rent to be fixed by arbitration or agreed upon for *Roof* coal, and £100 an acre for *Deep Hard* coal; and the lease contained a covenant by the lessees to leave unworked and uninjured a barrier of coal sixty-six yards wide next the working of the *Rutland Colliery*, leased to Messrs. *Potter*, and also a barrier of fifty yards wide next the *Butterley Company's* workings from the *Granby Colliery*, and barriers and pillars for the support of *Cotmanhay* church and parsonage house, or any other buildings on the surface lands as the mineral agent of the Defendant should direct, the said barrier of sixty-six yards wide to be paid for as therein provided by a fixed rent, but no acreage rent to be charged for any such barriers and pillars as aforesaid. And it was declared that nothing therein contained should be construed so as to prevent the lessor, or his present or future tenants or lessees, from working any coal not expressly included in the said demise, or any ironstone or other minerals within or under the said lands, but that the lessor and his tenants and lessees should have the same powers and privileges with respect to such last-mentioned coal, ironstone, or other minerals as if the said demise had not been made: Provided always that in exercising such powers and privileges as last aforesaid the working of the coal so demised should not be prevented or unnecessarily interfered with, and that reasonable compensation should be made to the lessees for any necessary interference with the workings. And provided also that before any such coal, ironstone, or other mineral should be demised to any tenant or lessee for the purpose of being worked or gotten, such coal, ironstone, or other mineral should be offered

to the lessees at such rents and upon such terms as such proposed tenant should have expressed his readiness to agree to, which terms should be unconditionally accepted by the lessees within twenty-one days after such offer, or the lessor should be at liberty to proceed as if no priority had been reserved to the lessees, and in no case should any tenant of the lessor be affected by the foregoing proviso.

At the time when the above lease was granted Sir *H. Wilmot* and *Lorenzo Hall* were trustees of a settlement of the *Mundy* family estates, under which *Alfred Mundy* was tenant for life, but *Alfred Mundy* having died, the present Plaintiff *Alfred Edward Mundy* had become tenant for life of the *Mundy* estates, and Sir *Henry Wilmot* having also died, the Plaintiff, *Lorenzo Hall*, was now the sole surviving trustee thereof.

Part of the lands comprised in this settlement and known as the *Shipley* estate, lay to the north of the lands of the Duke of *Rutland*, which were demised by the above lease of the 19th of January, 1866, and included an extensive coal-field worked by the Plaintiff *A. E. Mundy*, which immediately adjoined the demised mine. The land over the demised mine was divided by a road running north and south from *Ilkeston* to *Heanor*. The barrier of sixty-six yards wide mentioned in the lease lay along the southern boundary of the parcels west of the road and next to lands of the Duke of *Rutland*, under which he had at the date of the said lease demised the seams called the *Deep Hard* coal and the *Deep Soft* coal to Messrs. *Potter*. The minerals under that part of the *Shipley* estate which adjoined the western demised parcels on the north side lay to the deep of the minerals under the western demised parcels, and the last-mentioned minerals lay to the deep of the minerals worked by Messrs. *Potter*. The barrier of fifty yards wide mentioned in the lease lay along the southern and eastern boundary of the parcels east of the road and next to lands of the Defendant, the Duke of *Rutland*, the minerals under which were under lease to the *Butterley Company*. The minerals under that part of the *Shipley* estate which adjoined the eastern demised parcels on the west lay to the deep of the minerals under the eastern demised parcels.

The Plaintiffs alleged that it was essential to the safety of the

C. A. 1883 MUNDY v. DUKE OF RUTLAND.

workings in all the parcels so demised, and of the workings in the *Shipley* estate, that the barriers of sixty-six and fifty yards wide should be maintained whole and unbroken, and that pillars should be left in the mines lying under the mines demised by the said lease so as to support the barriers, roofs, and floors thereof, and to prevent the same from sinking and cracking, and that it was mainly for that object that the pre-emption clause was inserted in the lease.

The Plaintiffs then stated that at the commencement of the year 1879 they applied to the agent of the Duke of *Rutland*, in pursuance of the pre-emption clause in their lease, for the terms upon which the lowest seam of coal, called the "*Kilburn* coal," would be let to them, as they were desirous of working that seam in addition to the other seams, but the Duke's agent refused to grant the Plaintiffs a lease of that seam, on the ground that the only seams of coal comprised in the pre-emption clause were those lying above the coal already demised to the Plaintiffs. The Plaintiffs, however, afterwards discovered that the *Kilburn* seam of coal had, on the 5th of October, 1876, been let to the *Manners Colliery Company*, without any notice being given to the Plaintiffs. The parcels of that lease comprised all the seams of coal below the *Deep Hard* coal and extended to all the property of the Duke of *Rutland*, being about 917 acres, for a term of forty years at certain rents and sums of money payable as therein specified, and the said lease contained this covenant on the part of the lessees: "The lessees shall leave unworked and uninjured, without being compelled to pay for the same, such barriers, ribs, and pillars of coal under any buildings, and under the town of *Ilkeston* or elsewhere as the mineral agent of the lessor shall direct; and without any necessity for such direction, and without being compelled to pay for the same, will leave a barrier of coal of the breadth of thirty yards against the adjoining mineral property under the *Nutbrook Canal*, and shall also keep and leave open waterways and air-gates."

The Plaintiffs further alleged that the Defendant, the Duke of *Rutland*, intended to permit the *Manners Colliery Company* and the said company intended to work and carry away the coal lying under the said barriers of sixty-six and fifty yards respectively,

and if such working should take place the effect would be to cause the barriers to sink and crack; and thereby the workings in the minerals demised to the Plaintiffs would be irreparably injured by water and otherwise. The *Manners Company* had already worked to within eighty yards of the barrier of sixty-six yards.

The claim was for a declaration that the granting by the Duke of *Rutland* to the *Manners Company* of the lease of the *Kilburn* and other seams of coal without previously offering the lease thereof to the Plaintiffs was a breach of the covenant in the Plaintiffs' lease, and that the Duke of *Rutland* was liable for damages which the Plaintiffs asked to be assessed by the Court; and they claimed an injunction to restrain the Duke of *Rutland* and his agents from permitting the lessees under the lease of the 5th of October, 1876, from working under the said barriers of sixty-six and fifty yards wide in such manner as to cause the barriers, or either of them, to sink or crack, or so as to cause any injury to the workings in the minerals demised to the Plaintiffs by the lease of the 19th of January, 1866, or any injury to the minerals lying under the *Shipley* estate; and they further claimed an injunction in the same terms against the *Manners Colliery Company*, who were made Defendants at their own request.

An interim injunction in the terms of the claim had been granted on the 24th of June, 1881. The action came on for hearing before Mr. Justice *Kay* on the 24th of March, 1882.

Witnesses were examined on both sides, consisting of mining engineers and others acquainted with the working of mines, the principal question turning upon the effect which the Defendants' works would have upon the Plaintiffs' seams of coal, in case such works were carried on underneath the barriers of coal left by the Plaintiffs under the terms of their lease, as a protection against injury from a large quantity of water pressing against the outside of the barrier. The evidence was of a very contradictory character.

W. W. Karslake, Q.C., *Rigby*, Q.C., and *Dibdin*, for the Plaintiffs:—

We contend that under the terms of our lease we are entitled

C. A. 1883 MUNDY v. DUKE OF RUTLAND.

to support to enable us to work the seams of coal demised to us. We have complied with our covenants in leaving barriers, but if the Defendants are allowed to undermine those barriers we shall be deprived of any power to work the coal, and our evidence shews that the barriers will sink and crack, and will let in the water from the adjoining worked-out mines. This water is so extensive that our mines will be flooded, and it would cost a very large sum of money to empty the mine and afterwards to keep it free from water.

We also contend that we were entitled under the pre-emption clause in our lease to have the refusal of a lease of the *Kilburn* seam of coals, and of all seams lying under those included in our lease. Instead of which the Duke of *Rutland* has let those seams, without any notice to us, to the *Manners Colliery Company*. Our claim, therefore, is for damages against the Duke, as well as for an injunction to restrain the working of the coals under the barriers so as to injure our works. We applied for a lease before we knew that a lease had been actually granted to the *Manners Colliery Company*. It might have been worth our while to pay a large sum in order to protect ourselves, and though we might not have sunk a shaft we could still have worked the coal from the *Shipley Colliery*.

Barber, Q.C., and *French*, for the Duke of *Rutland*:—

The lease to the Plaintiffs contains a covenant on their part to leave barriers as a protection to the surface, but the Duke of *Rutland* entered into no covenant to leave these barriers. They were not intended as a protection to the *Shipley* property, but the real question is whether any damage will of necessity arise from working under the barriers. The utmost that is proved is that there may possibly arise a damage, and the Court will not grant an injunction on mere apprehension of danger when the effect would be to cause an undoubted loss to the Duke. But even if water should get through the barriers it would be a mere question of money, for which compensation might be awarded in the shape of damages. The utmost the Plaintiffs can be entitled to is reasonable and natural support, but that does not include support against a reservoir of water. We are under no contract to support

a barrier against such an unusual danger as that. Under any circumstances no danger has arisen yet against which the Plaintiffs can be entitled to an injunction. Then, as to the pre-emption clause, we say that it was never intended by the Duke to extend to the *Kilburn* seam, and there is no evidence that the Plaintiffs would have taken a lease upon the terms of the lease granted to the *Manners Company*, and therefore there could be no damages awarded.

Higgins, Q.C., and *Seward Brice*, for the *Manners Colliery Company* :—

We are not bound to keep up the barrier between our seams of coal and any other seams that may belong to the Duke of *Rutland*. We are at liberty to work our coal to the best advantage for our own profit. All we are bound to do is to give support to the land above that which is being worked by us: *Clegg* v. *Dearden* (1); *Jegon* v. *Vivian* (2). The owner of minerals has a right to take away the whole of them in his land, according to the natural course of user: *Wilson* v. *Waddell* (3); *Smith* v. *Kendrick*, cited in *Wilson* v. *Waddell* (4).

The support contended for here is not support for a mine but for a barrier.

The intention was that we should be allowed to work the entire bed of coal, and as we are working the coal in the usual and proper mode we are not liable for any injury that may be caused: *Eadon* v. *Jeffcock* (5). *Fletcher* v. *Ryland* (6) is also in our favour.

Another question arises upon the fact that we had no notice of the right claimed by the Plaintiffs, and they are not entitled to restrain us from doing an act in contravention of the restrictive covenants entered into by our lessors: *Renals* v. *Cowlishaw* (7); *Master* v. *Hansard* (8); *Kemp* v. *Bird* (9). Then again the Plaintiffs have stood by and allowed us to expend no less than

(1) 17 L. J. (Q.B.) 233.
(2) Law Rep. 6 Ch. 742.
(3) 2 App. Cas. 95.
(4) Ibid. 99.
(5) Law Rep. 7 Ex. 379.
(6) Ibid. 3 H. L. 330.
(7) 11 Ch. D. 866.
(8) 4 Ch. D. 718.
(9) 5 Ch. D. 549, 974.

C. A. 1883 MUNDY v. DUKE OF RUTLAND.

£70,000 without interfering, which is alone sufficient to disentitle them from now preventing us from continuing our works. We have evidence that the effect of preventing us from working the coal under the barriers would be ruinous to us, as we should be unable to obtain the best coal in the seam.

Rigby, in reply.

KAY, J.:—

The Duke of *Rutland* has an estate in *Derbyshire* which, I am told, comprises about 900 acres, under which are valuable mines of coal. The seams to which it is necessary to refer are six, which at a point near to the barrier lie thus: The *Main*, or *Deep Soft*, 124 yards from the surface; the *Deep Hard*, 17 yards beneath that; the *Piper*, 15 yards deeper; the *Furnace*, 40 yards deeper; a small seam under it 3 yards deeper; the *Black Shale* 78 yards deeper; and the *Kilburn*, 110 yards deeper. These measurements include the thickness of the various seams themselves. The *Main Soft* consists of a seam 4 ft. 3 in. thick; the *Deep Hard* is 4 ft. 6 in. thick, and below the *Deep Hard* there are nearly 20 feet altogether of coal in different strata, all of which, I understand, are more or less workable. The coal in these seams dips from south to north, and from east to west in the form of a saucer, the deepest point on the Duke's land being where it adjoins the settled estates of the Plaintiff *Mundy*.

In the beginning of the year 1866 the *Main Soft* and the *Deep Hard* seams had been largely worked on the Duke's land, leaving only about 190 acres to the deep, where it adjoins the Plaintiffs' land, ungotten. These workings having been on the long wall system, which leaves no pillars or workable coal, had partly closed and were filled with water, which rose in the pit to some seventy-five yards above the *Deep Hard* mine, and the pressure of that water, which is estimated to be in extent some 200 acres, against the face of the coal left unworked to the deep, is stated to be about 100 lbs. to the square inch.

In that state of things the Duke of *Rutland* let to the trustees of the settlement of Mr. *Mundy's* property, of which Mr. *Mundy*, now deceased, was then tenant for life, the unworked portion of

the *Main Soft* and *Deep Hard* seams, comprising about 196 acres and adjoining the coal in the same seams in the *Mundy* property. [His Lordship here stated the terms of the lease as already set out, and continued :—]

It is now well settled that an owner of land by merely letting mines does not impliedly give up his right of having sufficient support left for the surface. It is not necessary to refer to more cases on this point than *Harris* v. *Ryding* (1) and *Davis* v. *Treharne* (2).

In *Humphries* v. *Brogden* (3) Lord *Campbell* says, "Where portions of the freehold lying one over another perpendicularly belong to different individuals and constitute (as it were) separate closes, the degree of support to which the upper is entitled from the lower has as yet by no means been distinctly defined." With regard to the surface, Lord *Campbell* says (4): "Something has been said of a right to a reasonable support for the surface; but we cannot measure out degrees to which the right may extend, and the only reasonable support is that which will protect the surface from subsidence and keep it securely at its ancient and natural level."

From this it appears that the degree of support for underlying strata is not necessarily the same as for the surface. But there can be no question that when the owner of several seams of coal sells or lets some of the upper seams, he must by that grant confer on the purchaser or lessee a right to sufficient support from the underlying strata to enable him to use the strata granted for the purpose for which he acquired them.

The first question I have to consider is the true meaning of the lease. I have said the mere letting without more would pass such right of support as I have just described. But the proviso that nothing shall prevent the Duke or his tenants from working any coals or minerals within or under the said lands, but that they should have such powers and privileges with respect to the same as if the said demise had not been made, would *primâ facie* be a relinquishment by the lessee of all right of support. However, that is again qualified by the proviso which follows: "That in

(1) 5 M. & W. 60.
(2) 6 App. Cas. 460.
(3) 12 Q. B. (N.S.) 739, 743.
(4) Ibid. 745.

C. A. 1883 MUNDY v. DUKE OF RUTLAND. Kay, J.

exercising such powers and privileges as last aforesaid, the working of the coal so demised shall not be prevented or unnecessarily interfered with, and that reasonable compensation shall be made to the lessees for any necessary interference with the workings."

And I think the reasonable construction as to right of support is that the right of support is relinquished so as to enable the Duke or his tenants to work the underlying coal, except only that such working shall not take away the support to such an extent as to prevent or unnecessarily interfere with the working of the demised coal, and all necessary interference is to be compensated by damages. The difficulty is to know what in that clause is the meaning of the words "necessary" or "unnecessary." I think they must be taken to refer to the Duke's reserved power of getting as much of the underlying coal as possible. In one sense it is not necessary that he should get any coal; but that would not be a reasonable mode of construing the proviso. "Necessary" is a relative word, and here relates to the position of the lessor and lessee under this lease.

That is all that need be said about the general meaning. The concrete question here is with reference to the barrier. In my opinion, such a getting of coal from the underlying seams as would destroy the barrier or let the water through in considerable quantity, would be improper as a derogation from the grant. If the water came with a rush it would probably stop for some time the working of the mine, and if this stoppage lasted for six months even, I should think that a prevention of working within the meaning of the proviso. If the barrier were so seriously shaken that the water came through in considerable quantities so as to occasion very great additional trouble and expense to the lessees in working the demised coal, that I should think unnecessary interference.

My view of the lease is that the Duke has thereby granted, by force of this proviso, a sufficient support to the barrier to keep it substantially intact for the purpose for which it was intended, as a water-tight division between the old worked-out mine and the demised seams of coal. This being the grant of a legal incident to the demised coal, any subsequent attempt to make a grant to other persons inconsistent with it would be simply void, and the

subsequent grantees could no more protect themselves by a plea of want of notice than if their grant were of the coal itself comprised in the former lease.

The Plaintiffs have worked out the coal in the *Deep Hard* in the demised mine, and are now working the *Deep Soft* by headings driven to within thirty yards of the barrier and a cross heading parallel to it, the face of which, opposite to the barrier, is being taken away on the long wall system.

In 1876 the Duke demised to the Defendants, the *Manners Company*, all the seams of coal lying below the *Deep Hard*, under the whole estate of 900 acres. This included the area of the mines demised to the Plaintiffs, of the barriers, and a further area to the south and east.

It is not alleged that he expressly gave the Defendants the power of destroying the support. The lease contains this provision:—

"The lessees shall leave unworked and uninjured, without being compelled to pay for the same, such barriers, ribs, and pillars of coal under any buildings and under the town of *Ilkeston* or elsewhere, as the mineral agent of the lessor shall direct; and without any necessity for such direction, and without being compelled to pay for the same, will leave a barrier of coal of the breadth of thirty yards against the adjoining mineral property under the *Nutbrook* canal, and shall also keep and leave open waterways and air gates."

The *Manners Company* at an expense of £70,000 have sunk to the *Kilburn* seam, and are now getting that seam to the rise, *i.e.*, on the side farthest from the Plaintiffs' mines and the barrier. Recently they began to drive a heading down towards the barrier with the purpose of passing under it, and by a cross heading at the limit of their take under the Plaintiffs' mine, working back on the long wall system, so as to get all the coal in the *Kilburn* seam under the mine demised to the Plaintiffs and under the barrier. They plead their right to do this, and deny that the Plaintiffs have any right of support, and this has been argued at the Bar on their behalf.

The difficulty in the case arises from the evidence. Upon very

C. A. 1883 MUNDY v. DUKE OF RUTLAND. Kay, J.

contradictory testimony the Court has to determine whether working out all the coal, as the Plaintiffs claim to do, will injure the barrier, so as to let the water through in any material quantity.

The claim of the Defendants I must take to be to get all the seams demised to them under the barrier, which would, as I have shewn, abstract altogether nearly twenty feet in thickness. However, at present no working is being done by them, except in the *Kilburn* seam, and whatever I may have to declare as to the right, no injunction could be properly granted at present, unless the working in the *Kilburn* seam would interfere with the Plaintiffs' rights.

On the Plaintiffs' side I have the testimony of several mining engineers of the highest position, who all state that in their opinion it would be impossible to get all the coal in the *Kilburn* seam under the barrier on the long wall system, without seriously injuring the barrier. The fair result of the Plaintiffs' evidence is that the cleavage of the coal runs across the barrier, and accordingly any crack would be likely to run in the same direction; that if so cracked and water began to come in, it would soon make itself a larger opening, and would probably come so fast as to drown the mine, in which case there would be great danger to the workmen employed, and it would take a time estimated from a year to two years to get out the water, and also continual pumping at the rate of 500 gallons a minute afterwards, to keep the mine dry. The cost of this, it is stated by some of these witnesses, might amount to £20,000.

On the other side are at least an equal number of witnesses who seem to me to be of equal eminence, who say that there would not be the slightest danger to the barrier, and that all the coal might safely be worked out from under it in the *Kilburn* seam on the long wall system. I always regret very much these differences of opinion in the evidence of expert witnesses. I can do nothing but treat the opinions on one side as balancing those on the other, and disregard both.

But then the witnesses appeal to facts. The Plaintiffs' witnesses prove that by working the *Soft* and *Hard* seams at from 180 to 250 yards below the surface there has been a considerable

subsidence, which has injured buildings, such as *Cotmanhay* Church, *Tomlinson's* farmhouse, and others, has lowered the *Nutbrook* canal for some hundreds of yards, and cracked the banks of it so that water runs through in torrents. They say the subsidence is visible like a wave on the land, and has occasioned in one place a crack 100 yards long, crossing a road, and six inches wide at the top, so that a horse might get its leg into it, which was produced by getting the soft coal 180 yards below.

On the other hand, Mr. *Harrison*, one of the witnesses, says that the *Eastwood Colliery Company* have worked the *Deep Hard* in those collieries 173 yards below a barrier eighty yards thick in the *Top Hard*. They have cleared out nearly a mile, leaving no support, and are now working the *Deep Soft* 158 yards below the same barrier, and it remains perfectly dry though, there is against it on the rise a pressure of water estimated to be 112 lbs. to the square inch. But it is stated that the cleavage runs not across but in the line of the barrier, and the Defendants' witnesses admit that it is universal to require coal to be left under mansions and generally under churches, and that leases commonly contain a clause providing that coal shall be left where the lessor gives notice that he wants it to protect buildings.

Then a witness was called for the *Manners Company* who also seems to be an experienced and eminent mining engineer, and who has charge of collieries in *Derbyshire* and other counties. He gives it as his opinion that the coal may be safely got in the *Kilburn* seam from under the barrier, but he states that he considers it to be the most astonishing case of tightness of strata that he ever heard of, that a barrier like this, eighty-eight yards thick, should keep back such a great amount of water. He says if disturbed it would be likely to help the water to get through, and he and others of the Defendants' witnesses agree that to work the *Piper* seam, which is next to the *Deep Hard*, would probably injure the barrier.

It seems that an interim injunction was granted in this case in the form of restraining the Defendant company from working under the barriers in such manner as to cause them to sink or crack, or so as to cause any injury to the workings or to the minerals demised to the Plaintiffs. The chairman of the Defen-

C. A. 1883 MUNDY v. DUKE OF RUTLAND. Kay, J.

dant company has been called as a witness, and he says the advice given them by their own engineer after the order was not to work under the barrier. Their engineer said it was possible to work without cracking the barrier, but under the circumstances he would not advise them to work pending the injunction, and accordingly even the heading has not been driven further.

Upon this evidence I must come to the conclusion that in getting all the coal in the *Kilburn* seam under the barrier there would be danger of so injuring it as to let the water through in considerable quantity, and so as greatly to damage the Plaintiffs' workings in the demised land.

I accordingly must grant an injunction restraining the Defendants, their respective servants, agents, and workmen, from working, or causing or permitting to be worked, the coal in the *Kilburn* seam under the barriers in the pleadings mentioned in such manner as to cause the said barriers, or either of them, to sink or crack so as to let through the water on the outside of them into the Plaintiffs' workings on the demised land to such an extent as to prevent or interfere with such workings.

Another question raised against the Duke of *Rutland* is as to the right of pre-emption given by this lease to the Plaintiffs in respect of any other seams of coal under the demised land. The Plaintiffs ask for damages against the Duke on the ground that the lease was granted to the *Manners Company* without making any offer to the trustees of the *Mundy* property. This seems to me to have been a breach of the contract in the Plaintiffs' lease. The question is whether any damage has resulted. The *Kilburn* seam is not yet opened on the *Mundy* estate, though it is said they have sunk to within eighty yards of it. The difficulty is to ascertain whether, if the offer had been made, the trustees would have accepted it. The offer of course must have been of all the coal under the seams demised to them down to and including the *Kilburn* seam at a dead rent to commence at once, and I must suppose under an engagement to open and work these seams within a reasonable time. That would have involved a very large outlay of capital on the part of the trustees. Whether they had or could procure such capital I have no evidence. No attempt

has been made to shew that they would have accepted such lease if offered.

In their answer to interrogatories they say they are not now willing to accept such lease. It seems they have several thousand acres of their own, and I cannot suppose it would be worth their while to take a lease of this coal for any purpose, except to protect the barrier. According to my decision it was not necessary for their purpose. I therefore think I shall be doing justice as to the claim by saving the parties the expense of any inquiry as to damages, and assessing them myself at the sum of 40*s.*

The Defendants must pay the costs of the action.

T. W. G.

C. A. 1883 MUNDY v. DUKE OF RUTLAND. Kay, J.

From this judgment the Defendants appealed.

C. A.

The appeal came on for hearing on the 27th of November, 1882. The points raised were similar to those raised in the Court below.

Barber, Q.C., and *French*, for the Duke of *Rutland*, referred to *Pattisson* v. *Gilford* (1).

Higgins, Q.C., and *Seward Brice*, for the *Manners Colliery Company*.

W. W. Karslake, Q.C., *Rigby*, Q.C., and *Dibdin*, for the Plaintiffs, cited *Davis* v. *Treharne* (2); *Rowbotham* v. *Wilson* (3).

[JESSEL, M.R., referred to *Aspden* v. *Seddon* (4).]

Barber, in reply.

JESSEL, M.R.:—

The question that we are asked to decide is, what is the meaning of one proviso, or rather two provisoes, in a lease. Now I am free to confess that having read the clause over a great many times, and having heard very elaborate arguments of four Queen's counsel on the subject, I do not know what it means, and the

(1) Law Rep. 18 Eq. 259.
(2) 6 App. Cas. 460.
(3) 8 H. L. C. 348.
(4) Law Rep. 10 Ch. 394; S. C. 1 Ex. D. 496.

C. A. 1883 MUNDY v. DUKE OF RUTLAND. Jessel, M.R.

only question therefore we have to decide is, if the language is unintelligible, what is the effect upon the rights of the lessee independently of the proviso. Now it is quite plain that the grantor in a grant in fee, *à fortiori* that the lessor in a lease, cannot derogate from his own grant. If therefore he has granted two mines, or two veins or seams of coal, he has no right by working seams below to let down those veins or seams, nor has he a right to let down a barrier so as to drown the veins or seams. The argument on the part of the Appellants goes to this extent—that they might work the *Piper* seam, which is immediately below, I think about twenty yards below, the lower of these seams, the effect of which would be to let down the seams altogether—not merely the barrier, but the seams themselves; that is to say, they might destroy the subject of the demise, and as I read the clause, without making compensation. Of course you may make any kind of bargain: and, it may be that these people would have agreed to pay £500 a year and get nothing for it. But if you ask me to speculate as to whether rational men would be likely to enter into such a bargain I do not think they would; and therefore whatever the construction is, I cannot bring my mind to believe that the construction contended for by the Defendants was the construction intended by the parties. It is not necessary for me to say more than that. There is not to my mind in this lease a clause authorizing the landlord to do what he claims to do, and it is for him to shew that he has such a clause. As he has not made that out clearly, I think the point of construction must be decided in favour of the Respondents.

COTTON, L.J.:—

I am of the same opinion. This clause was introduced in order in some way to make a provision in favour of the landlord, but I have found the very greatest difficulty in understanding what the provision in favour of the landlord was intended to be or to what extent it is to go. That being so, there is here in the mine a barrier for which the lessees are under the lease to pay a rent, and which is to be kept up always by them and not to be worked. We must deal with this case on the hypothesis that the work which the landlord intends to carry on, or which

the Defendants, his lessees, intend to carry on, would destroy that barrier which the Plaintiffs were to leave, and for which they were to pay rent. Where a grantor intends to reserve to himself such a right he ought to express it in clear terms, and although I cannot say to what extent this right reserved to the landlord was intended to go, it, in my opinion, does not contain sufficiently plain terms to enable him to carry on operations which would entirely destroy, according to our present hypothesis, that which was demised to his lessees. In my opinion, therefore, this clause cannot settle the question.

BOWEN, L.J.:—

I am of the same opinion. I have studied this clause, and at the end I remain in profound uncertainty as to what it means. I think the uncertainty is not only an uncertainty which is shared by the other members of the Court who have preceded me, but shared also by the counsel on both sides. If the landlord had meant to reserve the power which he claims he should have done so in clear terms.

JESSEL, M.R.:—

As regards the question of fact I do not wish at present to express any opinion beyond this, that I am not satisfied on the evidence that it is clearly made out that the effect of this working of the lowest seam, which is being worked on the long wall system, will necessarily or inevitably—I use the words in the sense of "with the greatest probability"—break down the barrier. There is the most contradictory evidence of experts on both sides, and there is also something which I think requires some further explanation, namely, as to what has been effected in the *Eastwood Colliery*. I do not quite understand now what effect has been produced on the barrier there—whether any effect has been produced, or whether the barrier has sunk to any and what extent equally. As I understand it has not cracked. But beyond that I do not gather from the evidence exactly what has happened. Under these circumstances we think it would be desirable that we should be assisted by the report of a gentleman of eminence fully acquainted with these matters. Of course, that report is

C. A. 1883 MUNDY v. DUKE OF RUTLAND.

not finally binding upon the Court, but we think that if we had such a report with reasons of an unbiassed person it would assist us in coming to a conclusion, and, as we suggested before, it is most desirable that the parties themselves should select such a person in whom they would have confidence, and who would be sent down to examine the mine and make a report on the subject. The appeal will stand over until the report is made.

A gentleman well acquainted with mining business was accordingly nominated by the parties, and sent by the Court to examine the mine. He reported that the workings of the *Manners Colliery Company* in the *Kilburn* seam would in all probability affect the security of the Plaintiffs' mine.

On the 17th of March, 1883, the matter came on for final decision, when the Court, acting on the fresh evidence, held that the Plaintiffs were entitled to an injunction, and dismissed the appeal with costs.

Solicitors: *C. T. Foster; Eyre & Co.; Torr, Janeways, & Co.*

M. W.

C. A. 1883 *Feb.* 22.

ROBINSON *v.* DRAKES.

[1879 R. 137.]

Practice—Notice by Respondent in Appeal to vary Order—Rules of Court, 1875, *Order* LVIII., *r.* 6—*Apportionment of Costs.*

In an action for redemption of a mortgage vested in the Defendant *R.* as a trustee for the Defendant *D.*, who was in possession, *D.* set up the case that he was not in possession by virtue of the mortgage, but under a lease. The Court decided that he was in possession as mortgagee, and made a decree on that footing, but without rests. The Defendants appealed. The Plaintiff gave notice that at the hearing of the appeal he should ask to have the decree varied by directing the account to be taken with rests. The Court of Appeal held that the decree was right in treating *D.* as mortgagee in possession, but refused to direct rests:—

Held, that as the case was one where the costs could not have been materially increased by the notice, the costs ought not to be apportioned as in *Harrison* v. *Cornwall Minerals Railway Company* (1), but that the Defendants should have £5 for their costs incidental to the notice.

THIS was an action for redemption of a mortgage which had been transferred to the Defendant *Rhodes* as a trustee for the Defendant

(1) 18 Ch. D. 334.

Drakes. The Plaintiff alleged that the Defendants were in possession under the mortgage. The Defendants set up the defence that *Drakes* was in possession not under the mortgage but under a lease which he alleged to have been granted to him by the owners of the equity of redemption, at a rent less than the actual rental of the property. Mr. Justice *Chitty* considered this defence not established and made a decree for redemption, treating *Drakes* as being mortgagee in possession and liable to account as usual on the footing of wilful neglect and default. The Defendants appealed. The Plaintiff thereupon gave notice that at the hearing of the appeal he should apply to have the order varied by directing the account to be taken with rests.

Ince, Q.C., and *Nalder*, for the Defendants.

Everitt, Q.C., and *Russell Roberts*, for the Plaintiff.

The Court affirmed the decree, and did not vary it as asked by the Plaintiff.

Counsel for the Defendants then asked that the costs might be apportioned as in *Harrison* v. *Cornwall Minerals Railway Company* (1).

JESSEL, M.R.:—

In a case like this where the costs cannot have been materially increased by the notice of the Plaintiff, I think that the costs ought not to be apportioned. The Defendants ought to have the costs connected with the notice, but not the costs of separate briefs upon it. We shall allow them £5, and subject to this deduction the Plaintiff will have his costs of the appeal.

LINDLEY and BOWEN, L.JJ., concurred.

Solicitor for Plaintiff: *H. T. Chambers.*
Solicitors for Defendants: *Collyer-Bristow & Co.*

(1) 18 Ch. D. 334.

H. C. J.

C. A.
1883
Feb. 21, 23.

TOWNSEND *v.* TOWNSEND.

[1882 T. 148.]

Practice—Concurrent Actions—Stay of Proceedings—Lancaster Court—Conduct of Proceedings.

A judgment creditor of the Defendant brought an action in the Court of the County Palatine of *Lancaster* to obtain a declaration that he had a charge upon certain lands of the Defendant comprised in a certain deed of settlement, and to carry into effect the trusts of the settlement. He obtained judgment for a declaration of his charge, and for administration, inquiries and a receiver. Afterwards one of the beneficiaries under the settlement brought an action in the High Court to carry into effect the trusts of the settlement, and charging the trustees with a breach of trust. Judgment was obtained and inquiries directed, including one as to the breach of trust:—

Held, that the Plaintiff in the Palatine action was not a stranger to the action in the High Court, and was entitled to the conduct of that action; and he undertaking to add the inquiry as to the breach of trust to the inquiry in the Palatine action, the Court stayed all proceedings in the action in the High Court.

ON the 29th of July, 1881, *R. Siddall*, a judgment creditor of the Defendant *Richard Townsend*, commenced an action in the Chancery Court of the County Palatine of *Lancaster* claiming a declaration that he was entitled to a charge on the hereditaments comprised in two indentures of the 30th of September, 1868, and the 28th of January, 1869, and to have the trusts of those indentures carried into execution. The Defendants were *Richard Townsend* and the trustees of the indentures.

On the 23rd of February, 1882, judgment was given in this action declaring that the Plaintiff was entitled to a charge on the hereditaments comprised in the indentures, subject to prior incumbrances, and that the trusts of the indentures ought to be carried into effect, and directing certain accounts and inquiries, and a receiver of the property was appointed. Some time afterwards the present action of *Townsend* v. *Townsend* was commenced by Mrs. *Townsend*, one of the persons beneficially interested in the property under the trusts of the two indentures, against the trustees and *Richard Townsend*, and a statement of claim was delivered on the 24th of May, 1882.

The Plaintiff alleged that the trustees had improperly paid debts of *Richard Townsend* in priority to certain annuities payable under the trusts; and claimed a declaration that the trusts ought to be carried into effect, and that the annuities payable under the indentures ought no longer to be postponed for the benefit of *Richard Townsend.*

Judgment was given in this action on the 30th of June, 1882, by Mr. Justice *Fry*, declaring that the trusts of the indentures ought to be carried into effect, and directing certain inquiries, and, among others (No. 5), an inquiry whether any and what sums payable to any and which of the persons interested under the said trusts had been postponed for any of the purposes mentioned in the indenture of the 28th of January, 1869, and what was the amount of the sums postponed.

Siddall then took out a summons to stay proceedings in the action of *Townsend* v. *Townsend*, and in the alternative that he might have liberty to attend the proceedings and have the conduct of that action. This summons was adjourned into Court, and on the 20th of January, 1883, Mr. Justice *Fry* refused the application with costs, on the ground that *Siddall* was a stranger to the action, but gave liberty to *Siddall* simply to attend the proceedings in *Townsend* v. *Townsend.*

Siddall appealed from this order.

Glasse, Q.C., and *S. Hall*, for the Appellant:—

Our action was brought first, and we have obtained judgment and a receiver; therefore, by the ordinary rule we are entitled to stay proceedings in *Townsend* v. *Townsend*, or else to have the conduct of the action. It makes no difference that our action is in the Palatine Court. That was decided in *In re Swire* (1). We are quite willing that any inquiry that the Plaintiff in *Townsend* v. *Townsend* wishes should be added to our judgment.

Cozens-Hardy, Q.C., and *Norton*, for the Plaintiff in *Townsend* v. *Townsend*:—

The Plaintiff *Siddall* is not one of the beneficiaries under the trusts which are being administered in our suit. He is, therefore, a mere stranger, and has no *locus standi* for such an application

(1) 21 Ch. D. 647.

C. A. 1883 TOWNSEND v. TOWNSEND.

as this: *In re Yates* (1). Our action is more comprehensive than his, and it will do us no good to adopt the proceedings in the Palatine Court.

Levett, for the Defendants.

JESSEL, M.R.:—

It is perfectly clear that it is not right for these two administration actions to go on together. *Siddall* commenced his action first, and it is therefore clear that according to the general rule he is entitled to the conduct of both actions. But it is said that there is some relief claimed in *Townsend* v. *Townsend* which is different from and independent of the relief claimed in the action in the Palatine Court. That appears to be the case, therefore the second suit was not irregularly instituted. *Siddall* cannot be said to be a stranger to the action of *Townsend* v. *Townsend*; he was entitled to an order to attend the proceedings, but he could not be expected to be contented with the order made by Mr. Justice *Fry*: he is entitled to the general conduct of the action.

I think the proper order will be to discharge Mr. Justice *Fry's* order, and *Siddall* undertaking, with the consent of the Plaintiff in *Townsend* v. *Townsend*, to add inquiry No. 5 to the judgment in the Palatine action, the Plaintiff in *Townsend* v. *Townsend* to have the conduct of that particular inquiry, and to have power to add any further accounts and inquiries as she may be advised. Then all further proceedings in *Townsend* v. *Townsend* will be stayed, and the costs of this application, and all the costs in the action of *Townsend* v. *Townsend*, to be disposed of by the Vice-Chancellor in the action of *Siddall* v. *Townsend*.

LINDLEY, L.J., concurred.

Solicitors for the Plaintiff *Siddall*: *Johnson & Weatherall*, agents for *Stevenson, Lycett, & Co., Manchester.*

Solicitors for the Plaintiff *Townsend*: *Clarke, Woodcock, & Ryland*, agents for *Woodcock & Sons, Haslingden.*

Solicitors for the Defendants: *Milne, Riddle, & Mellor*, agents for *T. H. Townsend, Rawstentall.*

(1) 3 D. J. & S. 402.

M. W.

HACK *v.* LONDON PROVIDENT BUILDING SOCIETY.

C. A.
1883
PEARSON, J.
Jan. 20.
C. A.
Feb. 24.

[1882 H. 4779.]

Building Society—Arbitration—17 & 18 *Vict. c.* 125, *s.* 11 [*Revised Ed. Statutes, vol. xii., p.* 411]—37 & 38 *Vict. c.* 42, *s.* 34—*Summons to refer to Arbitration and to stay the Action—Dispute between Society and Member—Mortgage.*

By the rules of a building society incorporated under the *Building Societies Act*, 1874, it was provided, pursuant to sect. 16, sub-sect. 9 of the Act, that a reference of every matter in dispute between the society and any member of the society should be referred to the arbitration of the Registrar of Friendly Societies. The Plaintiff, who was an advanced member of the society and had executed a mortgage for securing his subscriptions and fines in respect of the advance, commenced an action against the society for an account in respect of the mortgage transaction:—

Held (affirming the decision of *Pearson*, J.), that the jurisdiction of the Court was ousted, and that the society was entitled to have the dispute referred to arbitration.

Wright v. *Monarch Investment Building Society* (1) approved.

THE *London Provident Building Society* was incorporated in 1876 under the *Building Societies Act*, 1874.

The rules were similar to those of other building societies, providing both for unadvanced and advanced members.

The 78th rule was as follows: "A reference of every matter in dispute between the society or any person acting under them and any member or person entitled to claim on account of any member, on which the resolution of the board shall not be deemed satisfactory, shall be made to arbitration by the Registrar."

On the 18th of March, 1881, the Plaintiff executed a mortgage to the society of certain leasehold houses in *East Dulwich* in consideration of an advance of £600, and he thereby covenanted that he would during ten years from the 31st of March, 1881, pay the society forty quarterly subscriptions or repayments of £21 12*s.* each, and other moneys, if any, which under the rules of the society should become due or payable in respect of the said advance. The deed contained a power of sale in case of default, which was not to be exercised unless default should be made for one month

(1) 5 Ch. D. 726.

C. A. 1883 HACK v. LONDON PROVIDENT BUILDING SOCIETY.

in payment of moneys due to the society. And it was thereby agreed that the rules of the said society, so far as capable of applying to the said transaction, except so far as thereby expressly varied or as inconsistent with any of the provisions of the said mortgage deed, should, although not expressly therein referred to, apply to that transaction.

Only £400 of this sum of £600 was actually paid to the Plaintiff, the remainder being kept in hand till the buildings on the land should be finished.

The payments under the mortgage to the society having fallen into arrear, the society sold the premises under their power of sale for £500 to a purchaser.

The Plaintiff being dissatisfied with the price for which the society had sold the property, brought this action against them, claiming that an account might be taken of all moneys received by the society in respect of the sale, and of all moneys due from him on the said security, and that in taking the accounts the society might be debited with the excess of the true value of the premises above the sale price; and he also claimed a declaration that the society was not entitled to credit for more than the amount of the subscriptions and fines and costs due at the time of the sale and the balance then remaining unpaid of the principal money secured by the mortgage.

The Defendants took out a summons, which was adjourned into Court, before Mr. Justice *Pearson*, asking that the action and all matters in question might be referred to the Registrar of Building Societies for arbitration, and that all proceedings in the action might be stayed.

The summons was heard before Mr. Justice *Pearson* on the 20th of January, 1883.

W. King, for the Defendants:—

The Plaintiff became a member of the society, and is bound by all the rules of the society (37 & 38 Vict. c. 42, sect. 21). One of the rules is that every matter in dispute between the society and any member shall be referred to the Registrar. Sect. 34 of the same Act shews how disputes are to be determined by arbitration, and "whatever award shall be made by the arbitrators or

the major part of them . . . shall determine the dispute." The last clause of the section is that "where the parties to any dispute arising in a society under this Act agree to refer the dispute to the Registrar, or where the rules of the society direct disputes to be referred to the Registrar, the award of the Registrar shall have the same effect as that of arbitrators."

The case of *Wright* v. *Monarch Investment Building Society* (1) governs this. There the Master of the Rolls said, "The account may be more or less complicated, still the action is merely for an account against a mortgagee, and the Plaintiff has executed certain deeds in which he has bound himself to observe the rules of the society." Then his Lordship, after stating that disputes were to be referred to arbitration, and that he thought that brought the case under the 11th section of the *Common Law Procedure Act*, 1854, said, "I think also that under the *Building Societies Act*, 1874, these matters must be referred." Sects. 21 and 34 of the Act were there referred to, and it being shewn in that case that the rules of the society provided that all disputes between members should be referred to arbitration, the Master of the Rolls said, "I think in these circumstances the jurisdiction of this Court is ousted." On the authority of that decision this action, which is one for a money account, should be referred to the Registrar in accordance with the provisions of the Act and the rules of the society.

Dunham, for the Plaintiff:—

It is submitted that this case does not come within the rules of the society, as questions of law are involved in reference to this mortgage which should not be left to the arbitrary decision of the Registrar of Building Societies. The Defendants should not be allowed to repay themselves the advance which was made; and also be allowed the claim which they have put forth extending over the whole period of time. In *Wallingford* v. *Mutual Society* (2) there were questions of accounts in reference to a mortgage bond given to secure the due payment by instalments of a sum due, and it was stated that a provision making the total sum due enforceable on any default was not to be con-

(1) 5 Ch. D. 726, 729. (2) 5 App. Cas. 685.

C. A. 1883 HACK v. LONDON PROVIDENT BUILDING SOCIETY.

sidered a penalty. The decision in *Wright* v. *Monarch Investment Building Society* (1) has been virtually overruled by the judgment of the House of Lords in *Mulkern* v. *Lord* (2), which practically decided that the rules of such a society in reference to arbitration do not preclude the Plaintiff from a right of action, for that proceedings in respect of accounts under a mortgage and sale of the property, which might include title to redemption or a judgment of foreclosure, were not such disputes between the society and a member as the statutes had contemplated. The present is a case arising between the society and the Plaintiff, but not as a member of the society, and therefore is not within the rules. If the Registrar should make an award taking a decided view one way or the other, he could not be required to state a case for the Court to consider. The Registrar can only deal with disputes which arise between the society and its members as such. The case of *Morrison* v. *Glover* (3) is a case of this kind, and where an action by a member of a society was held maintainable. The decision in *Mulkern* v. *Lord* proceeded upon the authority of that case, upon the ground that the arbitration clauses and the rules in and under the statutes are only intended to apply to proceedings between the society and its members quâ members, and that being so it makes no difference if additional powers have been given by the Act of 1874. There is no distinction between the Act of 1874 and the Act of 10 Geo. 4, c. 56. What is now asked was never contemplated when the Act of 1874 was passed. It is confidently submitted that the jurisdiction of the Court is not ousted, and that the Plaintiff is entitled to have all questions tried out by the Court.

W. King, in reply.

PEARSON, J.:—

I think I am bound, so far as I can be bound by a decision of a Court of concurrent jurisdiction, by the case of *Wright* v. *Monarch Investment Building Society*. That was a decision by the Master of the Rolls upon the 34th section of the *Building*

(1) 5 Ch. D. 726. (2) 4 App. Cas. 182.
(3) 4 Ex. 430.

Societies Act, 1874, and the judgments of the Lords Justices and the House of Lords in *Mulkern* v. *Lord* (1) proceeded upon the former statutes of 10 Geo. 4, c. 56, and 6 & 7 Wm. 4, c. 32. They did not proceed upon the Act which was under consideration by the Master of the Rolls, and upon which he decided the case of *Wright* v. *Monarch Investment Building Society* (2). If the present had been a case under the former statutes, I should undoubtedly have been bound by the decision of the Court of Appeal in *Lord* v. *Mulkern*, confirmed by the House of Lords. That decision shews that the provisions of the former statutes applied only to small disputes, of what I may call an internal character, between the society and its members. Those were the disputes which were to be referred to arbitration, and the statutes did not apply to cases of foreclosure and redemption of mortgages. In regard to such cases Lord *Cairns* pointed out in *Mulkern* v. *Lord* (3) very clearly, and his observations were concurred in by the other noble Lords, that it is impossible to suppose that the statutes applied to them, inasmuch as it is not within the powers of an arbitrator to give the relief which the Court can give in an action for foreclosure or redemption. It is admitted in this case that though one dispute is in respect of the amount of the purchase-money for which the property was sold by the society, yet the whole action is in reference to money claims. And the questions as to them I conceive, looking at the terms of the Act of 1874, the arbitrator—the Registrar—is entitled to go into, and indeed into all the circumstances of the case, and to make his award, and when he does make his award it will be for neither foreclosure nor redemption, but simply that a sum of money has been found to be due from one party or the other. Nothing but money will be the subject of the award. Under these circumstances, finding that the Master of the Rolls has construed the 34th section as I am inclined to construe it myself, I shall follow his decision in *Wright* v. *Monarch Investment Building Society*, and hold that under the Act of 1874 and the rules of the society, the action and the matters therein must be referred to the arbitrator. I cannot help thinking that the Act of 1874 was

(1) 4 App. Cas. 182. (2) 5 Ch. D. 726.
(3) 4 App. Cas. 191.

C. A. 1883 HACK v. LONDON PROVIDENT BUILDING SOCIETY. Pearson, J.

passed purposely to give the arbitrator larger powers than he had under the former Acts, and I should be going counter to the provisions and spirit of that Act if I were to withdraw from the society and its members the right which it appears to me they possess, of having their disputes determined by the arbitrator, and instead thereof drive them to the expensive luxury of bringing an action in this Court. I shall make the order asked for by the summons, but leave the costs of all the proceedings to be awarded according to the discretion of the arbitrator.

T. F. M.

From this decision the Plaintiff appealed. The appeal was heard on the 24th of February, 1883.

Dunham, for the Appellant, referred to *Morrison* v. *Glover* (1); *Wright* v. *Monarch Investment Building Society* (2); *Mulkern* v. *Lord* (3); *Prentice* v. *London* (4); *Willesford* v. *Watson* (5); *Reeves* v. *White* (6); *Farmer* v. *Giles* (7); 17 & 18 Vict. c. 125, s. 11; 37 & 38 Vict. c. 42, s. 34; *Chitty's* Statutes (8).

W. King, for the Defendants, was not called on.

JESSEL, M.R.:—

I think the decision of Mr. Justice *Pearson* in this case is correct. I have said, not only in the cases which have been referred to, but I have said very often in this Court, that it is the duty of the Court first of all to find out what the Act of Parliament under consideration means, and not to embarrass itself with previous decisions on former Acts when considering the construction of a plain statute framed in different words from the former Acts.

Now we have first to see what this Act of Parliament says, and we must recollect this, that it is an Act of Parliament referring to building societies and to building societies only, and the provisions applicable to building societies in the older Acts, as I shall presently shew, were only extensions to building societies of

(1) 4 Ex. 430.
(2) 5 Ch. D. 726.
(3) 4 App. Cas. 182.
(4) Law Rep. 10 C. P. 679.
(5) Law Rep. 8 Ch. 473.
(6) 17 Q. B. 995.
(7) 5 H. & N. 753.
(8) Vol. vi. p. 270, n. (*b*).

some former Acts relating to friendly societies. But this is an Act to consolidate and amend the law relating to building societies. First of all, its object is to provide for the case where the rules of a society established under this Act direct disputes to be referred to arbitration. Then the 34th section says that arbitrators shall be named in a particular way, and the concluding words of the section are, "Where the parties to any dispute arising in a society under this Act agree to refer the dispute to the registrar, or where the rules of the society direct disputes to be referred to the registrar, the award of the registrar shall have the same effect as that of arbitrators." That is plain; and the question to be decided is, Do these rules direct that the disputes be referred to the registrar?

Now when you come to look at the rules you find that "everything in dispute between the society or any person acting under them, and any member or person entitled to claim on account of any member on which the resolution of the board shall not be deemed satisfactory, shall be referred to arbitration by the registrar." Here is a dispute to be referred to the registrar, and then, if that is so, the registrar has under the 36th section to make an award, with a power to refer the question of law to the Court. That, I think, is quite plain.

Then the next question is, what is the meaning of a reference of any matter "in dispute between the society and any person acting under them, or any member or person entitled to claim on account of any member." Is not that to include a claim for debt against the society by a member who has mortgaged his property to secure payment to the society? I cannot imagine anything plainer. If you put in the words "as member" I should come to the same conclusion, because this mortgage, when you come to look at it, is made by the Plaintiff as member to secure his subscriptions. The account to be taken of his security is, in my opinion, "as member." The deed recites that the mortgagor is a member, and has applied for an advance out of their funds of £600, being the amount to which he is entitled in respect of six £10 shares held in the society, and the mortgagee had agreed to advance the sum, and so on. Is not that a transaction between the society and the member? In my opinion it clearly is, and

C. A. 1883 HACK v. LONDON PROVIDENT BUILDING SOCIETY. Jessel, M.R.

the security is really only a security for his subscriptions and fines. Then the mortgage winds up in this way, "that the rules of the said society so far as capable of applying to these transactions, except so far as hereby expressly varied or as inconsistent with any of the provisions of these presents, shall, although not expressly herein referred to, apply to this transaction." It appears to me that if you are to adopt not the decision but the reasoning of the Court of Exchequer in *Morrison* v. *Glover* (1), that it is to apply only to a transaction between the society and their members as members, then this is a transaction between the society and its members as such. I admit that was not the view taken in the Court of Exchequer. We are not bound by the Court of Exchequer on that point; but even if you were to read the words "as members" into this rule, it is a transaction with a man as member.

The next point is, are you at liberty to insert these words? I think you are not. I can quite follow this argument, that you may see there are some subjects not intended to be included. That is possible. It is impossible to say that every conceivable dispute between the society and its members was intended to be included under this rule. But what I do say is that I cannot see any reason for excluding such a transaction as this.

I think there is no right to insert the words "as a member" into the rule. The rule is not in the same terms as in the case before the Court of Exchequer, nor is the Act of Parliament the same; but when you find the words "any person acting under them, and any member or person entitled to claim on account of any member," I cannot see that you have a right to insert the words. Of course it must be, if I may say so, a society transaction; but this is a dispute between a member and the society, and between the society and the member in reference to the securities given by him for his subscription and fines. There is an express provision, as I read it, that the rule shall apply, and what is the harm of so holding? Every one of the defects pointed out by the House of Lords in *Mulkern* v. *Lord* (2) has been cured. They pointed out that it was an extension to building societies of the *Friendly Societies Acts*, that by them there was only power to refer such

(1) 4 Ex. 430. (2) 4 App. Cas. 182.

questions to justices of the peace, and that that could not be meant. But all that is cured. You have a new Act providing in the most careful manner for everything that remains to be determined by arbitration, and so far from there being anything detrimental in referring these things to arbitration, it is a most desirable course. I am quite aware that at the time when the Court of Exchequer decided *Morrison* v. *Glover* (1) the opinion was the other way. The Judges did all they could to defeat the legislative provisions of these Acts; but of late years the tide has turned, and now Judges endeavour, where the Legislature has directed references to arbitration, to carry them out. Moreover it appears to me the words are plain.

I think that this is an agreement in writing under the *Common Law Procedure Act*. It is signed by the parties and it is an agreement. But I do not rest it on that, because I should have come to the same conclusion as to this order if there had been no *Common Law Procedure Act*. If there is an agreement to refer to arbitration, you can enforce that by motion in an action just the same, and therefore it was quite competent for the learned Judge in the Court below to direct the reference even if the *Common Law Procedure Act* did not apply.

Then with regard to the decisions, as I said before, *Morrison* v. *Glover* is not binding, nor is there any decision of the Appeal Court which makes it binding. In the next place nothing is better known than that on a question of mere construction even the decision of the Appeal Court on similar grounds is not binding on another Court, and much less on a Court of equal jurisdiction. As regards the construction of the instrument, even if there are the identical words, although we follow them, they are not strictly binding; but on similar words they are not binding. As I said before I do not think that a mortgage like this cannot be said to be a transaction between the society and its members. If that was the meaning of the Court of Exchequer in *Morrison* v. *Glover* I quite assent to it, but I am not sure it was. The covenant there which they refused to give effect to was a collateral covenant. Then as regards *Mulkern* v. *Lord* (2), we are bound by the decision of the House of Lords, and as I read the decision of the House of

(1) 4 Ex. 430. (2) 4 App. Cas. 182.

C. A.
1883
HACK
v.
LONDON
PROVIDENT
BUILDING
SOCIETY.
Jessel, M.R.

Lords it amounts to this, that looking at the provisions of the then Acts of Parliament, which apply to these societies, it could not be supposed that they were intended to apply to such a case as this. Lord *Cairns* says, that the view taken by Lord *Cranworth* in *Fleming* v. *Self* (1) appeared to him to coincide with what he had endeavoured to express, and when you look at *Fleming* v. *Self* you will find that was one of the grounds on which the case was decided by Lord *Cranworth*. It appears to me that *Mulkern* v. *Lord* (2) in the House of Lords, so far as it points out a *ratio decidendi*, is not only distinguishable from this case, but is an authority for deciding it in the way we are deciding it. As regards the judgment of the Court of Appeal in that case, I must say this, that the decision of the Court of Appeal was affirmed, but not the judgment, and that is a very important distinction. When the House of Lords affirm a decision on different grounds from those of the Court below, it is evidence, in fact proof, to those who know the practice of the House of Lords, that they do not agree with those grounds. Therefore a judgment so affirmed, so far from leaving the judgment of the Court of Appeal intact, shews the contrary, and that you are no longer bound by it. The mere affirmance of the decision is quite a different thing. You are bound by the decision but not by the reasons given for it. It is not necessary, therefore, to examine very minutely the grounds on which the Court of Appeal decided *Mulkern* v. *Lord*; and I have no occasion to do more than repeat the observations I have very often made, that I think it leads to great mischief, when an Act of Parliament is plain and clear, for Judges to refer to decisions on older Acts and then say they cannot distinguish sufficiently the new Act from the old, and that therefore the decisions are binding. Of course you may look at them with a view of seeing what the interpretation is, but I prefer to read the modern Act, find out what its meaning is, and if it is plain, to act according to its plain construction, without troubling myself with the decisions of the Courts on earlier Acts the provisions of which are not the same.

In my opinion the decision of Mr. Justice *Pearson* is right, and this appeal must be dismissed with costs.

(1) 3 D. M. & G. 997. (2) 4 App. Cas. 182.

LINDLEY, L.J.:—

I am of the same opinion. This case appears to me to be one of very great practical importance. The action is instituted by the Plaintiff in his character of mortgagor. He became a mortgagor by being an advanced member of the society. He gave a security, and the building society, as I gather from the statement of claim, have sold, and there is a dispute now as to the surplus as to how much ought to be restored to the Plaintiff. The dispute between the Plaintiff and the society is a dispute between the Plaintiff as an advanced member and the society. He could not have been the mortgagor, according to the manner in which the building society carries on its transactions, if he had not been an advanced member.

The next thing is to ascertain under what Act of Parliament the building society has been framed or governed; and it is familiar to everybody who has had occasion to study the legislation and the enactments relating to these societies that there has been not only a difference between the language, but a different object sought to be introduced by the later Acts. The machinery as to arbitration has been entirely altered; and it has been the desire to extend the Act, not only to cases capable of being dealt with by arbitration and to matters which can only be properly disposed of by arbitration, but to cases also of discovery of documents and things of that kind. There was no such power before; and looking at the whole of the decisions, of which *Fleming* v. *Self* (1) is one, and *Morrison* v. *Glover* (2) is another, it is important, not only to look at the later Acts, but to bear in mind the nature of the alternative tribunal. Lord *Cranworth* saw that plainly enough when he was disposing of *Fleming* v. *Self*, and I need not say that he would not have referred such a question as arose in *Fleming* v. *Self* to an ordinary justice of the peace. Lord *Cranworth* says (3): "The total absence of adequate machinery for enabling arbitrators to enforce any award they might make on the mortgage in a case like the present affords cogent evidence that the dispute is not within their competency." We have nothing to do with these older Acts of Parliament, except

(1) 3 D. M. & G. 997. (2) 4 Ex. 430.
(3) 3 D. M. & G. 1030.

C. A. 1883 HACK v. LONDON PROVIDENT BUILDING SOCIETY. Lindley, L.J.

as matter of history; but we have to do with the new Act framed for the purpose of improving the law in those respects in which the old Acts failed. We have now to deal with the Act of 1874 under which this particular building society was constituted. That Act of Parliament enables these building societies to make rules, and among other things which they are obliged to make rules upon are "The terms on which shares may be withdrawn, and upon which mortgages may be redeemed" (sect. 16, cl. 4). Then number 9 is, "Whether disputes between the society and any of its members, or any person claiming by or through any member, or under the rules, shall be settled by reference to the Court, or to the Registrar, or to arbitration." Then if we look at sections 34 to 36, we find that the method of referring the disputes to arbitration is provided, and the powers of the arbitrators are very much increased beyond the powers given to similar tribunals by the earlier Acts. In other words, we find an adequate tribunal constituted for deciding such disputes as these.

Then comes the question whether the parliamentary tribunal is to be had recourse to, or whether the Plaintiff is to be at liberty to bring his action. It appears to me that, looking at these Acts of Parliament, and bearing in mind the differences between them, we should be frustrating the action of the Legislature, and going backwards instead of forwards, if we were to hold that it was competent for the Plaintiff to bring his action in this Court. The Act of Parliament furnishes a cheap and expeditious mode, and it appears to me the view taken by Mr. Justice *Pearson* was quite right.

Whether this is such an agreement as would bring the case within the *Common Law Procedure Act* need not be decided, but I think we must stop this case, and send it to arbitration, according to the real agreement between the parties.

Solicitors: *Peard; Broad & Broad.*

M. W.

Ex parte IZARD. *In re* BUSHELL (No. 2).

C. A. 1883 March 8.

Lease of Bankrupt—Application by Trustee for Leave to disclaim—Compensation to Landlord—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 23, 24—*Bankruptcy Rules*, 1871, *r.* 28.

When the trustee in a bankruptcy applies for leave to disclaim a lease of the bankrupt, the Court will not order any compensation to be paid to the landlord unless the trustee has kept him out of possession of the property, and his occupation has resulted in a benefit to the bankrupt's estate.

The principle on which the Court exercises its discretion under rule 28 is that the trustee ought not to be allowed to increase the bankrupt's estate at the expense of the landlord.

Ex parte Isherwood (1) explained.

THIS was an appeal from a decision of Mr. Registrar *Murray* acting as Chief Judge in Bankruptcy.

A. T. Bushell carried on business as a tea and coffee merchant in *London* and in a number of other towns in *England* and *Scotland*, among others at *Leeds*. On the 8th of September, 1882, he filed a liquidation petition. On the following day *H. S. Foster* was appointed receiver of the debtor's property and manager of his business, and on the 7th of October *W. Izard* was appointed trustee in the liquidation.

The debtor occupied his shop at *Leeds* under a lease dated the 10th of March, 1881, for a term of seven years from the 14th of March, 1881, at a rent of £300 per annum, payable by equal quarterly payments on the 14th of June, the 14th of September, the 14th of December, and the 14th of March in each year. On the 25th of October, 1882, the landlord distrained on the premises for the quarter's rent due on the previous 14th of September, and seized (*inter alia*) and removed the fittings of the shop, and thus prevented the further carrying on of the business. The trustee took possession of the premises on the 28th of October, and on the 15th of November he sold the remaining stock-in-trade by auction on the premises, and realized thereby the sum of £61 1*s.* 7*d.*

On the 17th of November he sent the key of the premises to the landlord, who kept it, but did not otherwise take possession.

(1) 22 Ch. D. 384.

C. A. 1883 *Ex parte* IZARD. *In re* BUSHELL. (No. 2.)

On the 28th of November the trustee gave notice to the landlord of his intention to apply to the Court for leave to disclaim the lease of the premises. The application was heard on the 20th of December, 1882. The Registrar gave leave to disclaim, on the terms of the trustee paying to the landlord, as and for compensation, a sum of money at the rate of the rent of £300 per annum, to be calculated from the 7th of October to the 20th of December, 1882, both days inclusive.

The trustee appealed.

Herbert Reed, for the Appellant:—

The trustee ought not to have been ordered to pay the rent for any longer period than from the 28th of October to the 15th of November. The Registrar has misapprehended the effect of the decision of this Court in *Ex parte Isherwood* (1). It was there held that, in order to be entitled to any compensation, the landlord must shew some special circumstances. He must shew that the trustee's occupation has produced a benefit to the debtor's estate.

Yate Lee, for the landlord:—

On the evidence the Registrar came to the conclusion that the trustee had had possession of the shop from the date of his appointment, and had carried on the business there down to the date of the distress, and that he afterwards kept possession for the purpose of selling the stock, and the Registrar held that he ought to pay, as compensation to the landlord, the proportionate part of the rent for the time during which the landlord was kept out of possession. The landlord did not accept the key.

[JESSEL, M.R.:—As soon as you had the key you were not kept out of possession.]

The trustee is personally liable for the rent after he takes possession: *Ex parte Dressler* (2).

If the landlord accepted the key so as to work a surrender of the lease, there could not afterwards be a disclaimer by the trustee.

[JESSEL, M.R.:—You could accept the key without prejudice

(1) 22 Ch. D. 384. (2) 9 Ch. D. 252.

to any question. You could call upon the trustee to elect whether he would disclaim.]

The landlord's compensation ought not to be measured by the benefit derived by the debtor's estate from the occupation.

JESSEL, M.R. :—

This point has been already decided in *Ex parte Isherwood* (1): we went into the question fully there and decided it. We held that under rule 28 of 1871 we have a discretion as to the terms to be imposed on the trustee when he comes to ask the Court for leave to disclaim a lease. We expressly abstained from deciding whether the rule was *ultra vires*. Under the Act the landlord is entitled to nothing by way of compensation; if he is to get anything he can only get it under rule 28, which gives the Court a discretion in the matter. And we have laid down this principle, that the trustee is not to be allowed to increase the bankrupt's estate at the expense of the landlord, by retaining possession of his property and then keeping the profit he has made by so doing. But you must first shew that a benefit has resulted to the bankrupt's estate from the trustee's occupation of the property. That is the foundation of the whole thing. The next point is, the trustee must have kept the landlord out of possession. He can only be kept out for a month, for under sect. 24 he is entitled to call on the trustee to elect whether he will disclaim, and if he neglects to do so for twenty-eight days after the receipt of the notice, he is not entitled to disclaim at all. In the present case the key was given up to the landlord, and after that was done he had not much to complain of. There is no evidence that the business was carried on by the trustee at a profit, and we cannot say that the debtor's estate has been increased by the carrying on of the business. This we do know, that the landlord put in a distress, which prevented the further carrying on of the business. The only benefit which we know has accrued to the debtor's estate from the occupation is the warehousing of the stock for a short time and the use of the shop for the sale on the 15th of November. I think £20 will be sufficient compensation to the landlord for that.

(1) 22 Ch. D. 384.

C. A.
1883
Ex parte IZARD.
In re BUSHELL. (No. 2.)

BAGGALLAY, L.J.:—

I think £20 is quite enough.

LINDLEY, L.J.:—

I agree. I think that when the key was sent to the landlord he ought to have taken possession. There would have been no difficulty in his taking possession without prejudice to any of his rights.

Solicitors for trustee: *Piesse & Son.*
Solicitors for landlord: *Richard Smith & Wilmer.*

W. L. C.

C. A.
1883
C. J. B.
Feb. 5.
C. A.
March 15.

Ex parte WILLEY. *In re* WRIGHT.

Composition—Examination of Creditor—Jurisdiction—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 96, 125, 126—*Bankruptcy Rules*, 1870, *rr.* 166, 171.

Sect. 96 of the *Bankruptcy Act*, 1869, has no application to composition proceedings.

Decision of *Bacon*, C.J., reversed.

M. WRIGHT and *A. R. Wright*, who had carried on business in partnership as worsted spinners and stuff manufacturers, filed a liquidation petition in the *Bradford* County Court on the 24th of August, 1882. The first meeting of the creditors was held on the 4th of October, 1882, when resolutions were passed by the statutory majority accepting a composition of 6*s.* in the pound, payable in six instalments, spread over two years from the date of the registration of the resolutions. The instalments were to be secured by bills of exchange to be accepted by the debtors, and the last three instalments were to be further secured to the satisfaction of a committee consisting of six persons named, or a majority of them, and a trustee was appointed for the receipt and distribution of the composition. At the second meeting held on the 13th of October the resolutions were confirmed, and they were afterwards duly registered.

In the statement of their affairs which the debtors produced at the meetings, they stated that a firm of Messrs. *F. Willey &*

Brother were creditors in respect of four bills of exchange for sums amounting to £6863 0*s.* 6*d.*, drawn by them upon and accepted by the debtors, and that they held as security for the payment of those bills some goods of considerable value which had been deposited with them by the debtors. *F. Willey & Brother* did not attend the meetings or prove any debt thereat. On the 27th of October, after the registration of the resolutions, *J. H. Willey* (who was a brother of the partners in the firm of *F. Willey & Brother*, but was not a member of that firm) tendered a proof in the proceedings for £3412 10*s.* 6*d.*, the amount of two of the four bills which the debtors had accepted for *F. Willey & Brother*, stating in his affidavit of proof that he was the holder for value of those two bills.

On the 21st of November, 1882, the debtors' solicitors applied to the County Court for an order that a summons under sect. 96 of the *Bankruptcy Act*, 1869, might be issued for the attendance of *J. H. Willey* before the Registrar of the Court for examination upon his proof. The application was supported by an affidavit made by *M. Wright*, one of the debtors, in which he said that if the two bills had been proved by *F. Willey & Brother* they would have had to value and deduct the amount of their security. The deponent said that he had grounds for believing that *J. H. Willey* might not be the *bonâ fide* holder for value without notice of the two bills, and that he might not be the person entitled to receive the composition bills in respect thereof, and that on these grounds it was necessary and important that *J. H. Willey* should be examined before the Registrar touching his proof and the circumstances under which he claimed to be the holder of the bills. On the same day the Registrar issued a summons (in the Form No. 76 of the Bankruptcy Forms, 1870,) requiring the attendance of *J. H. Willey* for examination. On the 29th of November the composition bills in respect of all the four bills accepted by the debtors for *F. Willey & Brother* were tendered to them, but they refused to receive them because they had parted with the four bills. The composition bills in respect of the two bills in respect of which *J. H. Willey* had tendered a proof were then tendered to his solicitor on his behalf. In making the tender the debtors' solicitor attempted to impose the

C. A. 1883 *Ex parte* WILLEY. *In re* WRIGHT.

condition that the security held by *F. Willey & Brother*, or a part of it, should be given up to the debtors, but *J. H. Willey's* solicitor declined to accept the composition bills otherwise than unconditionally, and they were then left with him. *J. H. Willey* attended before the Registrar in obedience to the summons, but refused to be sworn, on the ground that the Court had no jurisdiction to issue a summons under sect. 96 in composition proceedings. The Registrar referred the matter to the Judge, who overruled the objection to the jurisdiction, and made an order declaring that *J. H. Willey* had been guilty of contempt in refusing to be sworn and examined, and ordering that he should be committed to prison for his contempt. *J. H. Willey* appealed to the Chief Judge. The appeal was heard on the 5th of February, 1883.

T. E. West, for the Appellant :—

This is a simple case of composition. There has been no adjudication, and nothing equivalent to an adjudication, in bankruptcy, and therefore sect. 96 of the *Bankruptcy Act*, 1869, which gives the Court power "on the application of the trustee at any time after an order of adjudication has been made against a bankrupt" to summon before it persons who may be deemed capable of giving information, does not, in a simple case of composition after resolutions have been registered, give the Court jurisdiction to order a creditor to be examined on the application of the compounding debtor. Although proceedings in liquidation have been assimilated to some extent with those in bankruptcy, there is no such assimilation in the case of a composition, the proceedings under which are regulated by sect. 126, and where, moreover, the Court has no seisin of the estate which is left to be administered by the compounding debtor. To give him a statutory power of summoning persons to appear and give evidence, greater than he would have had if he had remained a solvent trader, would be an anomaly in the *Bankruptcy Act* which the Court will not encourage by holding that sect. 96 applies to a case like this, where there are no proceedings before the Court in which an examination can be directed. The power of the Court of summoning persons to give evidence is not extended by the General Rules of 1870 (rules

166–170), which apply to witnesses generally, rule 171 being the only one which is directly applicable to sect. 96. In any case sect. 96 is discretionary, and the discretion ought not to be exercised for the purpose of deciding what equities affected these bills of exchange, which is not a question of bankruptcy law, but one to be determined by the ordinary tribunals.

Winslow, Q.C., and *Finlay Knight*, for the Respondents:—

Sect. 96 and the Rules apply to a composition as well as to bankruptcy and liquidation, and the power given by the section is constantly invoked by trustees to enable them to decide whether they will bring or defend actions—in this case whether the proof tendered is valid and proper. All three proceedings, though different in form, are proceedings in bankruptcy governed by the general enactments of the Act and Rules, and subject to the control of the Bankruptcy Court, which has jurisdiction under sect. 72 to decide all questions of priority and all other questions whatever; and this power is not limited to ordinary cases of bankruptcy, but has been frequently exercised in cases of composition: *Ex parte Shepherd* (1); *Megrath* v. *Gray* (2); *Ex parte Rumboll* (3).

The power of summoning witnesses is not limited to cases in which there has been an adjudication, as, by rule 32, after the presentation of the petition witnesses may be summoned to prove the statements in the petition. Rule 166, which must be taken in conjunction with rule 171, applies to cases of this description, and where an examination is necessary for the purpose of doing complete justice it will be directed: *Ex parte Crossley* (4); even after composition resolutions have been passed and registered: *Ex parte Jones* (5); *Ex parte Botting* (6). As soon as proof has been tendered the right of examination into what is really due arises *eo instanti*: *Campbell* v. *Im Thurn* (7); *Ex parte Peacock* (8). If necessary the Court will give leave to amend by adding the trustee as a party, but there is jurisdiction to make the order

(1) 2 Ch. D. 430.
(2) Law Rep. 9 C. P. 216.
(3) Ibid. 6 Ch. 842.
(4) Ibid. 13 Eq. 409.
(5) Law Rep. 16 Eq. 386.
(6) Ibid. 19 Eq. 261.
(7) 1 C. P. D. 267.
(8) Law Rep. 8 Ch. 682.

C. A. 1883

Ex parte WILLEY. *In re* WRIGHT.

for examination upon the application of the debtor: *Ex parte Austin* (1).

T. E. West, in reply.

BACON, C.J.:—

The whole of Mr. *West's* argument has proceeded upon a critical examination of the words of the statute; but he will forgive me for saying that he has lost sight of the fact that this is a proceeding in bankruptcy. When a liquidation takes place it is upon a petition to the Court of Bankruptcy, and comes within the jurisdiction of the Court and within the purview of the statute, for the statute relates to bankruptcy. A petition of a similar kind in which the debtor declares that he is utterly insolvent and commits an act of bankruptcy and submits himself to the jurisdiction of the Court, is no less a proceeding in bankruptcy, and sect. 96 need not be picked out from the other sections in the statute when the Court is called upon to administer the law in bankruptcy. All that, which is the true principle of administration in bankruptcy, is lost sight of in the argument on behalf of the Appellant. It has been said very truly that I must not look at any merits, nor do I, except only that I find a debtor stating in his affidavit the reasons why he desires to examine a creditor. I find that what he there states, if it be true, is a matter which concerns everybody engaged in this bankruptcy, for bankruptcy it is, although composition resolutions have been registered. It concerns the creditors to know what the amount of the debtor's liabilities is, and what means he has of meeting them, that they may form their own judgment as to accepting or not accepting the composition tendered. To the debtor it is of vital importance: to the creditors themselves it is of importance, because if in the statement of assets there appears such a result as makes it probable that the debtor will be able to pay the composition they are justified in accepting the composition. What do the resolutions for a composition come to? They are an equitable arrangement between the creditors, the majority prevailing, that the estate of the bankrupt should be divided among the persons

(1) 4 Ch. D. 13.

C. A. 1883 *Ex parte* WILLEY. *In re* WRIGHT. C. J. B.

there expressed. One of those persons, who is bound by the equitable contract between himself and the other creditors, comes in with a proof of a debt which is challenged. Is not that a reasonable ground for the Court, on whom the duty of administering the bankrupts' estate rests (for bankrupts I repeat they are), directing any investigation that it thinks fit into the circumstances of that proof so tendered? Sect. 96 is only one section in this *Bankruptcy Act*. The Act itself authorizes rules to be made in pursuance of sect. 96. If it had not done so, the general jurisdiction of the Court would be forthcoming to say that you may investigate any case in which questions arise as to the equitable right of the debtor, of the creditors bound by the composition, and of every creditor who comes in to prove. If there were no authority I should say it was the plain purview of the statute, and that there was no such limited interpretation to be put on it as has been contended for.

But when I find in *Ex parte Jones* (1) that there was authority to examine the bankrupt; when I find that rule 32 authorizes the examination before proceeding to adjudication, I cannot entertain a doubt that the whole statute in all its parts, and by the most rigorous construction that can be put on it, does accomplish the object it has in view, viz., to provide for an equitable administration of the whole of the bankrupt's estate; and in proceeding to do so the right to examine rigorously, or otherwise, any attempt that is made to share in this distribution of the estate is clear. In this case the gentleman who refuses to answer claims that he is entitled to share in the bankrupts' estate. In my opinion the objection is wholly unreasonable and unjust. I think the order appealed from was a right order, and I must dismiss this appeal with costs.

F. G. A. W.

C. A.

From this decision *J. H. Willey* appealed. The appeal was heard on the 15th of March, 1883.

Cooper Willis, Q.C., and *T. E. West*, for the Appellant:—

The Appellant was not bound by the composition, but he chose to come in and prove. The debtors were not entitled to apply

(1) Law Rep. 16 Eq. 386.

C. A. 1883

Ex parte WILLEY. *In re* WRIGHT.

for an order for examination under sect. 96 (1). If such an order can be made at all in a case of composition, it can only be made

(1) Sect. 96: "The Court may, on the application of the trustee, at any time after an order of adjudication has been made against a bankrupt, summon before it the bankrupt or his wife, or any person whatever known or suspected to have in his possession any of the estate or effects belonging to the bankrupt, or supposed to be indebted to the bankrupt, or any person whom the Court may deem capable of giving information respecting the bankrupt, his trade dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the bankrupt, his dealings or property; and if any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court at the time appointed, or refuses to produce such documents, having no lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may, by warrant addressed as aforesaid, cause such person to be apprehended and brought up for examination."

Sect. 125 (7): "The trustee under a liquidation shall have the same powers, and perform the same duties, as a trustee under a bankruptcy, and the property of the debtor shall be distributed in the same manner as in a bankruptcy; and with the modification hereinafter mentioned all the provisions of this Act shall, so far as the same are applicable, apply to the case of a liquidation by arrangement in the same manner as if the word 'bankrupt' included a debtor whose affairs are under liquidation, and the word 'bankruptcy' included liquidation by arrangement; and in construing such provisions the appointment of a trustee under a liquidation shall, according to circumstances, be deemed to be equivalent to and a substitute for the presentation of a petition in bankruptcy, or the service of such petition, or an order of adjudication in bankruptcy."

Sect. 125 (9): "The provisions of this Act with respect to the close of the bankruptcy, the discharge of a bankrupt, to the release of the trustee, and to the audit of accounts by the comptroller, shall not apply in the case of a debtor whose affairs are under liquidation by arrangement; but the close of the liquidation may be fixed, and the discharge of the debtor and the release of the trustee may be granted by a special resolution of the creditors in general meeting, and the accounts may be audited in pursuance of such resolution, at such time and in such manner and upon such terms and conditions as the creditors think fit."

There is no similar provision in sect. 126, which relates to composition.

Bankruptcy Rules, 1870, r. 166: "A subpœna for the attendance of a witness capable of giving evidence concerning any matter in the Court, before or after adjudication, shall be issued by the Court at the instance of a trustee, a creditor, a debtor, or any respondent in any matter, with or without a clause requiring the production of books, deeds, papers, and writings in his possession or control, and in such subpœna the name of only one witness shall be inserted. A subpœna may be issued in blank as at common law."

Rule 171: "Every application to the Court under sect. 96 of the *Bankruptcy Act*, 1869, shall be in writing, and shall state shortly the grounds

on the application of the trustee. But we say that it cannot be made at all in a composition. In such a case there is no trustee of the estate, as in a bankruptcy or a liquidation; if a trustee is appointed at all it is only for the purpose of receiving and distributing the composition. The Chief Judge held that the registration of composition resolutions was equivalent to an adjudication of bankruptcy. That is not so for all purposes.

[They were stopped by the Court.]

Winslow, Q.C., and *Finlay Knight*, for the debtors:—

There is no distinction between a subpœna for the examination of a witness and a summons for examination under sect. 96. Indeed, except in the case of a County Court, the forms of subpœna and summons are identical.

[JESSEL, M.R.:—Under the powers conferred by sect. 72 a trial may take place in the Court of Bankruptcy. If there is jurisdiction to try there must be jurisdiction to summon witnesses.]

Sect. 96 has been by rule 171 of 1870 extended by implication, so as to allow the application to be made by other persons than the trustee. But the trustee is willing to be taken to be a party to the present application.

[JESSEL, M.R.:—He will render himself personally liable for costs, and it cannot affect the costs up to the present time.]

He will accept this responsibility.

That sect. 96 has been enlarged by the rules is shewn by *Ex parte Swift* (1).

[JESSEL, M.R.:—That was a question of examining the debtor. I take it you could always examine the debtor.]

Sect. 78, which gives the Court power to make rules for the effectual execution of the Act and the objects thereof, and the

---

upon which the application is made, and where the application is not made on behalf of the trustee, the grounds upon which the application is made shall be verified by affidavit."

In the Schedule of Forms appended to the Rules of 1870, a form (No. 76) is given of "Summons under sect. 96 (in a County Court)." This is the form of summons which was used in the present case. The schedule contains no similar form for use in the *London* Bankruptcy Court.

(1) 26 L. T. (N.S.) 226.

C. A. 1883

Ex parte WILLEY. *In re* WRIGHT.

regulation of the practice and procedure of bankruptcy petitions and the proceedings thereon, justifies the extension of sect. 96.

[JESSEL, M.R.:—It could not enable the Court to make rules contrary to the Act. If the Act says a thing may be done by *A.*, can the rules authorize it to be done by *B.?*]

Taking sect. 78 in combination with the extensive powers given to the Court by sect. 72, "to decide all questions . . . . of law or fact arising in any case of bankruptcy coming within the cognizance of such Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case;" authorize the making of such a rule. Other cases which shew that the rules have extended sect. 96 are *Ex parte Austin* (1); *Ex parte Crossley* (2). There is, however, a matter pending before the Court, viz., the disputed proof.

But, unless it is expressly excluded, all the jurisdiction of the Court in cases of bankruptcy and liquidation applies also to cases of composition. Bankruptcy, liquidation, and composition are substantially the same thing: *Campbell* v. *Im Thurn* (3); *Megrath* v. *Gray* (4); *Ex parte Rumboll* (5).

Liquidation and composition proceedings are commenced by a petition in precisely the same form, and as soon as the petition is presented the Court has jurisdiction to determine as to the validity of proofs, and on the registration of the resolutions it must do so. The holder of bills on which the debtor is liable is bound by the composition, whether his name is known to the debtor or not. If a creditor comes in to prove after the registration he submits to the jurisdiction of the Court. What is there to take away the jurisdiction once acquired? The Court has power under sect. 126 to enforce the payment of a composition, and this involves the power of deciding whether a debt in respect of which the composition is claimed is really due: *Ex parte Botting* (6); *Ex parte Peacock* (7). That is what we desire to ascertain in the present case.

(1) 4 Ch. D. 13.
(2) Law Rep. 13 Eq. 409.
(3) 1 C. P. D. 267.
(4) Law Rep. 9 C. P. 216.
(5) Ibid. 6 Ch. 842.
(6) Ibid. 19 Eq. 261.
(7) Law Rep. 8 Ch. 682.

Cooper Willis, in reply:—

Sect. 19 gives the Court a general power to examine a bankrupt; but it applies only to bankruptcy and liquidation.

Ex parte Botting (1) was a peculiar case; the creditor there came to the Court to enforce the payment of the composition, and before the Chief Judge both sides assented to having the amount due ascertained by the Court. The creditor had been inserted in the debtor's statement, and the amount of his claim had been objected to before registration of the resolutions. There was a submission to the jurisdiction. A man who has not proved before the registration stands in a different position. After registration there is nothing pending before the Court except for the purpose of enforcing payment of the composition: *Ex parte Lacey* (2).

JESSEL, M.R.:—

I think this is a very plain case. I cannot see any doubt, question, or ambiguity about the meaning of the Act. I never allow my construction of a plain enactment to be biassed in the slightest degree by any number of judicial decisions or *dicta* as to its meaning, when those decisions or *dicta* are not actually binding upon me. I read the Act for myself. If I think it clear I express my opinion about its meaning, as I consider I am bound to do. Of course if other Judges have expressed different views as to the construction, and their decisions are binding on this Court, this Court has simply to bow and submit, whatever its own opinion may be. But when there is no such binding decision, in my view a Judge ought not to allow himself to be biassed in the construction of a plain Act of Parliament (for it appears to me to be plain) by any number of *dicta* or decisions which are not binding on him. The Judge ought with all due respect to examine into them, but he must not allow any number of *dicta*, or even decisions which are not binding on him, to affect his judgment, except in one peculiar case. That case is peculiar, and therefore I will mention it. Where a series of decisions of inferior Courts have put a construction on an Act of Parliament, and have thus made a law which men follow in their daily dealings,

(1) Law Rep. 19 Eq. 261. (2) 16 Ch. D. 131.

C. A. 1883 *Ex parte* WILLEY. *In re* WRIGHT. Jessel, M.R.

it has been held, even by the House of Lords, that it is better to adhere to the course of the decisions than to reverse them, because of the mischief which would result from such a proceeding. Of course, that requires two things, antiquity of decision, and the practice of mankind in conducting their affairs.

That being so, it appears to me not necessary in the present case to examine the modern *dicta*, for they are nothing more than *dicta*, of Courts of inferior jurisdiction. I think it would not be difficult to shew that not one of them really decides the point we have now to decide. I have made these preliminary observations with the view of avoiding the necessity of examining these cases in detail.

Now, what does the Act say? The 96th section is perfectly plain. It is limited in its terms to "the application of the trustee at any time after an order of adjudication has been made against a bankrupt,"—the Court may, on the trustee's application, summon certain persons to give discovery. It is a power, not to summon a man as a witness, but to summon him for the purpose of discovery, and he is treated in a totally different way from a witness. You cannot ask a witness the questions you can ask a man summoned under the 96th section. There are certain cases where a witness proves to be hostile to the person calling him, in which by permission of the Court you can cross-examine him, and ask him questions somewhat similar to those which you can ask under sect. 96, but even then you cannot go so far as you can under this section in the shape of discovery. It is framed with a different view from that of compelling a man to give testimony. It is not testimony but discovery emphatically which is its object.

Now that is a very grave power to entrust to any Court or any man, viz., power to summon any other man whom you suspect (for mere suspicion will do) to be capable of giving information, and to get any information from him, although that information may be extremely hostile to the interests of the man himself. It is a power which, so far as I know, is found nowhere except in bankruptcy and the winding-up of companies (which is a kind of bankruptcy); it is a very extraordinary power indeed, and it ought to be very carefully exercised. Now, that being the nature

of the power, does it, under sect. 96, apply to anything else than bankruptcy? To say that you can apply it of your own mere motion to a case of composition would be simply saying that you can legislate, because, if this special and inquisitorial power has been conferred by the Legislature only under special circumstances, to apply it under others would be pure and simple legislation. Is there any section applying it to composition? First of all, we must consider sect. 125, which relates to liquidation by arrangement, and we find that, by sub-sect. 7, there is an extension of the previous provisions of the Act to liquidation by arrangement. And there is a very good reason for this. Liquidation by arrangement is in many respects similar to bankruptcy. Sub-sect. 7 of sect. 125 says that "all the provisions of this Act shall, so far as the same are applicable, apply to the case of a liquidation by arrangement, in the same manner as if the word 'bankrupt' included a debtor whose affairs are under liquidation," and so on. So that we have then an express extension of sect. 96 to liquidation by arrangement. But, when we come to sect. 126, which deals with composition with creditors, which is different in many material points from both bankruptcy and liquidation by arrangement, we find no such extension of the previous provisions of the Act. And yet it has been gravely argued that, though there is no such extension, sect. 96 is to apply to composition. I really am at a loss to understand the argument. There is about as plain a declaration by the Legislature as you can possibly have, that this extraordinary power is only to be exercised by particular persons and in particular events, and then we are told that, without any other enactment, and without any sufficient reason, though the circumstances attending a composition are quite different from those attending either bankruptcy or liquidation by arrangement, we are to extend the power to composition. It seems to me there is no foundation for the argument. As I have already said, no number of *dicta* would convince me to the contrary, and, although there are some hazy observations, not relating to this particular point, to be found in some reported cases, I really do not seriously think that any Judge has ever said anything contrary to what I am now saying.

What I have already said is alone sufficient to conclude this

C. A. 1883 *Ex parte* WILLEY. *In re* WRIGHT. Jessel, M.R.

case. But it has been suggested that there is no difference between a summons under the 96th section and a writ of subpœna. As I have already said, there is all the difference in the world. In the one case it is a summons for discovery, and in the other case it is a subpœna for the witness to give testimony. Now I do not say that you could in the present case issue a subpœna. I do not intend finally to decide that question now, because it is not necessary; but I am not satisfied that, when *Ex parte Botting* (1) is rightly understood, it lends any countenance to such a notion. It must not be supposed that *Ex parte Botting* does extend the 96th section, or that it can be extended to any case not within its purview, unless indeed it is extended by the 171st rule as to the person who may make the application, which is a very different question, and one as to which I intend to reserve my opinion until the question actually arises. As regards the applicant, where the bankrupt or liquidating debtor is concerned, it is quite clear to my mind that the 96th section wants no extension. You can examine him to any extent upon the application of any one; but as regards the examination of other people I wish expressly to reserve my opinion, and treat the point as one still to come for decision. I do not wish to decide it now, more especially as we are promised a new Bankruptcy Act, and I hope that in that measure there will be an enactment plain enough to be our guide without requiring further consideration.

COTTON, L.J.:—

What we have to consider on this appeal is whether the order made to commit the Appellant was right. Now that order was made because he refused to be examined under a summons which had been issued for his examination. That summons was undoubtedly issued under sect. 96 of the *Bankruptcy Act* of 1869, and the point to be considered is whether the order to issue the summons was rightly made under sect. 96, because, if that order was improperly made, it is impossible that he can have been rightly committed for refusing to be examined when so summoned, even though he might by a different proceeding have been required to attend as a witness. The distinction is obvious,

(1) Law Rep. 19 Eq. 261.

as has been pointed out by the Master of the Rolls. A witness must be examined in a matter pending before the Court, and as to something which is relevant to the proceeding before the Court. But under sect. 96, the object of which is discovery, there is not necessarily any matter pending before the Court, and the person summoned may be examined upon any matter relating to the dealings, or property, or trade, of the bankrupt, as to which it is supposed he can give some information. If he has no information his answers will come to nothing. It therefore makes a most material difference whether a man is summoned under that section or is summoned as a witness. We are to treat this application as made by the trustee, and, treating it in that way, in my opinion this summons was not justified in a proceeding like this, which is a composition, and not a bankruptcy or a liquidation by arrangement. Sect. 96 is clear, and I quite agree with the Master of the Rolls that no *dicta* of Judges when the matter was not really before them, or even if it was, unless those *dicta* amount to decisions which bind us, ought to induce us to go against the clear words of the statute. Here the words of the section are, in my opinion, clear, that the power is given only on the application of the trustee in a bankruptcy after an order of adjudication has been made.

But it is said that the power is not confined to bankruptcy. Why? Because when you come to liquidation by arrangement under sect. 125, there is an express enactment that all the provisions of this Act shall, so far as the same are applicable, apply to the case of a liquidation by arrangement in the same manner as if the word "bankrupt" included a debtor whose affairs are under liquidation. It is not, therefore, by any construction of the Court that sect. 96 is made to apply to liquidation by arrangement, but by reason of the express provision of sect. 125, which applies to liquidations by arrangement that which has been previously enacted with reference to bankruptcies. But we find nothing whatever in sect. 126 which applies to compositions all the previous enactments, as we do in the case of liquidations by arrangement. Moreover, in sect. 125 there is a provision that the appointment of a trustee under a liquidation shall, according to circumstances, be deemed to be equivalent to and a substitute

C. A. 1883 *Ex parte* WILLEY. *In re* WRIGHT. Cotton, L.J.

for the presentation of a petition in bankruptcy, or the service of such petition, or an order of adjudication. There is nothing of that kind in sect. 126. The proceedings which are taken under sect. 96 are with reference to bankruptcy especially, for it is said that they shall only be taken after adjudication, and there is a very good reason why sect. 96 should not apply to a composition. It enables discovery to be made as to the dealings of the bankrupt with his estate. In composition the creditors at the meetings have to make up their minds whether they will accept an offer by the debtor to pay a certain composition. There is no vesting of the debtor's estate in a trustee, and there is no distribution of the estate among the creditors. All they obtain is a right, if they assent to the composition, to get that which they have agreed to accept in discharge of their debts. That makes a distinction which shews, in my opinion, that sect. 96 is not properly applicable to composition, and, if it had been so applied by the Act, I should have felt great difficulty in understanding why it had been. It is very true that, in order to enable the creditors to determine whether they shall accept the debtor's offer, they must have the fullest means of asking the debtor questions. And so they have, because the debtor is bound to present himself at the meetings, and is bound to answer any questions put to him, and this Court has several times held that, where there has not been a substantial compliance with that provision, no composition will bind dissentient creditors. That being so, it is clear that sect. 96 does not apply.

But it is said that rule 171 assumes that some other person than the trustee could apply for a summons under sect. 96. It is not necessary to decide whether that is so now, because there is nothing in the rule to indicate that sect. 96 applies to composition. Still I must say I cannot see how any rule can extend the clear terms of sect. 96. In my opinion this order is wrong, and the appeal must succeed.

I agree with the Master of the Rolls that it is not necessary to go through the cases which have been cited, but I think it right to add, as he has done, that we simply discharge the order to commit. We give no opinion whether the trustee or the debtor could, against the wish of a creditor, cross-examine him. If a

creditor is proceeding to enforce the payment of the composition to him, it may be that there is such a right, as was held to exist in *Ex parte Botting* (1). But I do not bind myself by any expression of opinion whether, if a creditor is sought to be cross-examined after the registration of the resolutions, with the view of disputing the proof which he has put in, this can be effectually done, or whether he is not at liberty to say, "If you dispute my debt I will go away and rely on my right not to be bound by the composition at all." That question has not to be decided now, and I mention it only to shew that I do not favour the view that the trustee can take proceedings against the wish of the creditor to cross-examine him.

LINDLEY, L.J. :—

I am of the same opinion, and will only add a few words.

When we bear in mind that the Appellant has been committed for contempt, we must see what order it is which he has disobeyed. It was an order to attend and be examined under sect. 96. The order to commit him cannot be supported on any other ground than that. Then when we look at sect. 96 we find that it does not in terms apply to such proceedings as these. Its language is not applicable to compositions at all. Why then are we to hold that it does apply to such a case? It is argued that compositions, liquidations, and bankruptcies, are all for this purpose substantially the same thing. Is that so? I think it is quite plain that it is not true to say that they are all substantially the same thing for this purpose. *Ex parte Jones* (2) shews that there is a marked difference between liquidation and composition proceedings. If sect. 96 does not apply to composition proceedings, this order to commit must be wrong. It must be wrong even if the Appellant is liable to be examined with reference to his debt, or cross-examined with reference to his proof. Whether he is so liable I will say nothing, except that I do not at present see any power to examine or cross-examine a creditor in composition proceedings after the registration of the resolutions, unless he comes, as the Appellant did in *Ex parte Botting*, and submits himself to the jurisdiction. Having regard to *Melhado* v. *Watson* (3), I will say

(1) Law Rep. 19 Eq. 261. (2) Law Rep. 10 Ch. 663. (3) 2 C. P. D. 281.

C. A. 1883 *Ex parte* WILLEY. *In re* WRIGHT.

no more upon that point. In my opinion this order is wrong, and the appeal must succeed.

Solicitors for Appellant: *Layton, Jaques, & Co.*, agents for *Watson & Dickons, Bradford.*

Solicitors for debtors and trustee: *Prior, Bigg, Church & Adams*, agents for *Gardiner & Jeffery, Bradford.*

W. L. C.

C. A. 1883 *March* 6.

In re GADD.

EASTWOOD *v.* CLARK.

[1882 G. 959.]

New Trustees—Power to appoint—Exercise of Power after Decree for Administration of Trusts.

A decree for the administration of the trusts of a will directed "that some proper person be appointed" a trustee of the will in the place of a deceased trustee. The power of appointing new trustees was given by the will to the surviving trustee, who was the Defendant. The Plaintiff took out a summons to have *A. B.* appointed trustee, and the Defendant a summons to have *C. D.* appointed. The summonses were adjourned into Court, and *Bacon*, V.C., appointed the nominee of the Plaintiff:—

Held, on appeal, that the decree did not take away from the Defendant the power of appointing new trustees, though after decree he could only exercise it subject to the supervision of the Court; that if he nominated a fit and proper person such person must be appointed, and the Court would not appoint some one else on the ground that such other person was in the opinion of the Court more eligible, and that if he nominated a person whom the Court did not approve the Court would not itself make the choice, but would call on him to make a fresh nomination:—

Held, therefore, that the appointment of *A. B.* must be discharged.

Middleton v. *Reay* (1) distinguished.

G. T. GADD by will, dated the 25th of May, 1869, appointed his wife *Mary Gadd* and the Defendant executors and trustees, and gave the income of his property to his wife for life, then to his daughter *Margaret* for life, and after the death of the survivor he directed that the income should be applied for the benefit of the children of his daughter till the youngest attained the age of twenty-one years, and then he directed that his trustees should

(1) 7 Hare, 106.

sell his property and divide the proceeds among the children of his daughter in equal shares, or the lawful issue of such of them as might then happen to be dead. He declared that on the death, refusal, or incapacity to act of any trustee or trustees the surviving or acting trustee, his executor or administrator, might appoint a new trustee or new trustees as occasion might require, to whom any requisite conveyances should be made, and who might act in all respects in the same manner as if named and appointed in his will.

The testator died in April, 1870, and his will was proved by both executors. The widow died in January, 1882. The testator's daughter died in 1876, leaving one child, who was born in 1876.

In January, 1882, the daughter's child, by her father as her next friend, commenced this action for the administration of the estate. By the judgment, dated the 1st of July, 1882, it was ordered that the trusts of the will should be carried into execution, the usual accounts and inquiries were directed, and it was ordered "that some proper person be appointed a trustee of the testator's will in the place of the said *Mary Gadd* and jointly with the Defendant, the existing trustee."

On the 28th of November the next friend took out a summons that *Samuel Eastwood* might be appointed a trustee in the place of *Mary Gadd* to act jointly with the Defendant. On the following day the Defendant took out a summons, asking that *William Whiteley* might be appointed.

The summonses were adjourned into Court, and Vice-Chancellor *Bacon* (February 2, 1883) made an order appointing the nominee of the Plaintiff to be trustee jointly with the Defendant.

C. A.

The Defendant appealed, and the appeal was heard on the 6th of March, 1883.

Millar, Q.C., and *P. B. Abraham*, for the Appellant:—

This case is governed by the principle of *Tempest* v. *Lord Camoys* (1). The power of appointing new trustees is as much one of the trusts of the will as anything else contained in it. The

(2) 21 Ch. D. 571.

C. A. 1883

In re GADD. EASTWOOD *v.* CLARK.

Court will see that it is properly exercised, but does not take it from the donee and exercise it without regard to him.

Hemming, Q.C., and *George Williamson*, *contrà*:—

The Judge has exercised his discretion in preferring one nominee to another, and the Court will not interfere with it. Under the old practice the Court did not interfere with the discretion of the Master.

[JESSEL, M.R.:—The Judge had no discretionary power to say that another person was better than the nominee of the person who had the power.]

The trustee nominated some one whom the Court did not approve, and then the Court could appoint.

[JESSEL, M.R.:—That is not so; the trustee in such a case must be told to nominate some one else.

BAGGALLAY, L.J., referred to the observations of the Master of the Rolls in *Tempest* v. *Lord Camoys* (1): "This may be illustrated by the case of persons having a power of appointing new trustees. Even after a decree in a suit for administering the trusts has been made they may still exercise the power, but the Court will see that they do not appoint improper persons."]

That does not shew that if they nominate improper persons the Court cannot then appoint.

[BAGGALLAY, L.J.:—If they repeatedly nominated improper persons that would amount to a refusal to exercise the power, and the Court then could appoint, but I do not see why the power should be destroyed by a single nomination of which the Court does not approve. If the conduct of the Defendant had been impeached by the action the case would stand differently.]

Middleton v. *Reay* (2) shews that there is a power in the Court to appoint some one whom it considers more eligible than the person nominated by the donee of the power.

[JESSEL, M.R.:—That case turned on the form of the decree, which directed the Master to approve of trustees, without saving the authority of the donee of the power. That form was not right. The modern form is so framed as to preserve the power.]

(1) 21 Ch. D. 578. (2) 7 Hare, 106.

There is in this case no such reservation of the power as Vice-Chancellor *Wigram* mentions.

[JESSEL, M.R.:—The decree here simply directs that "some proper person be appointed." That does not take away the power. It is not like a direction that the Master shall approve or appoint trustees, which if not qualified in some such way as Vice-Chancellor *Wigram* mentions does override the power.]

Middleton v. *Reay* (1) has always been considered by the profession as laying down the general rule. We object to the nominee of the Defendant.

JESSEL, M.R.:—

I am of opinion that the appointment cannot stand. If the Plaintiff wishes to take objections to the fitness of the Defendant's nominee the case will be referred back to the Vice-Chancellor to consider the objections. If they are allowed, then the Defendant must nominate some other person, subject to the approval of the Court.

BAGGALLAY and LINDLEY, L.JJ., concurred.

It was then arranged that to save further expense the Court of Appeal should decide as to the fitness of the nominee, the objections to whom appeared in the affidavits used before the Vice-Chancellor. No objection was taken to the capacity, circumstances, or character of the Defendant's nominee, the only objections being that he was a nephew of the Defendant and lived in *Sheffield*, while the property which the trustees had to manage was at *Halifax*. There was evidence that the nominee was well qualified for the office, was a person of independent means, had a good deal of leisure, and spent a considerable part of his time at *Halifax*. The Court considered that he was a fit and proper person, and made an order for his appointment.

Solicitors: *Williamson, Hill, & Co.; F. J. Mann.*

(1) 7 Hare, 106.

H. C. J.

FRY, J.
1883
Jan. 27, 29;
Feb. 3, 5.

WEST OF ENGLAND AND SOUTH WALES DISTRICT BANK *v.* MURCH.

[1879 W. 182.]

Will—Trust for Sale—Charge of Debts—Partnership Property—Power of Executor to sell—Power to appoint new Trustees—Appointment of One Trustee in place of Two—23 & 24 *Vict. c.* 145, *ss.* 27, 30 [*Revised Ed. Statutes, vol. xiii. pp.* 919, 920].

A testator, who carried on business in partnership with his brother, by his will, dated the 23rd of November, 1861, directed payment of his debts, and, after bequeathing specific and pecuniary legacies, he devised and bequeathed all his real and leasehold and personal estate to trustees, upon trust for sale and conversion into money, and to hold the proceeds of sale on certain trusts. In 1872 the brother and the testator's widow, who was then the sole trustee and executrix of the will, joined in selling and conveying real estate, of which the brother and the testator had been tenants in common, and which was in fact partnership property, to a limited company who purchased the business. The purchase-money was to be paid partly in cash and partly in fully paid-up shares and debentures of the company. At the same time an arrangement was made for the handing over of the whole purchase-money to the bankers of the partnership, to whom the partnership was largely indebted, and whose debt was secured by mortgages of the partnership property, in satisfaction of the debt due to the bankers, the bankers undertaking to pay the other creditors of the partnership, and handing back to the executrix a sum of cash and some of the debentures, and providing certain other benefits for the brother. The conveyance of the real estate to the company contained a recital that the brother and the widow were entitled to the property in equal undivided moieties, and the widow purported to convey as trustee of her husband's will, but it was not stated in the deed that she was his executrix or that the property was partnership property.

On a subsequent sale of the property by the company, the purchaser objected that the sale by the widow was not authorized by the trust for sale, the consideration not being entirely paid in money:—

Held, that the arrangement as to the disposition of the purchase-money received from the company amounted to a compromise by the widow with the creditors and with the surviving partner into which it was competent to her as executrix to enter under s. 30 of the Act 23 & 24 Vict. c. 145:

And *held*, on the authority of *Corser* v. *Cartwright* (1), that this being so, and the real estate being partnership property which the widow, as executrix, was entitled to sell, and inasmuch as she, as trustee, had the legal

(1) Law Rep. 7 H. L. 731.

estate, and as executrix was the proper person to receive the purchase-money, the sale to the company was a valid one and their title good.

The power of appointing new trustees given by s. 27 of the Act 23 & 24 Vict. c. 145, authorizes a retiring trustee, one of two originally appointed, to appoint a single trustee in place of himself, the other original trustee having previously disclaimed without acting.

ADJOURNED SUMMONS.

This was a summons by purchasers at a sale under the direction of the Court, asking that they might be discharged from their purchase on the ground that the vendors had failed to make out a good title to the property authorized to be sold.

The action was brought on behalf of the debenture-holders of a company called *T. W. Booker & Co., Limited*, against the trustees of a deed to secure the payment of the debentures, and the company. The company was afterwards ordered to be wound up, and an order for sale of the property on which the debentures were secured was made in the action and in the winding-up, and it was directed that the sale should be made by the liquidators of the company. The contract for sale was dated the 14th of September, 1881, and was made between the liquidators of the one part and the purchasers of the other part, and by it the liquidators agreed to sell, and the purchasers agreed to purchase, certain freehold and leasehold property of the company for the sum of £72,500.

John Partridge Booker and his brother *Thomas William Booker* had carried on in partnership the business of ironmasters and tin-plate manufacturers, at the *Melin Griffith Works*, in *Glamorganshire*; and they were possessed of various freehold and leasehold estates, which were occupied for the purposes of the business, and were vested in them as tenants in common.

J. P. Booker, by his will, dated the 23rd of November, 1861, directed payment of his just debts and funeral and testamentary expenses as soon as conveniently might be after his decease, and, after making specific and pecuniary legacies to his wife, *Clara Georgina Booker*, he devised and bequeathed all the real and leasehold, and also all the personal estate (except as aforesaid) which he should die seised and possessed of or interested in, unto *R. F. Langley* and *James Wellington*, "upon trust that they and the survivor of them, or the executors or administrators of such

FRY, J.
1883
WEST OF ENGLAND AND SOUTH WALES DISTRICT BANK v. MURCH.

survivor, do and shall, at their or his discretion, either sell and convert the same into money, or postpone such sale and conversion for such time as they or he may think proper, with full power to enter into such arrangements with the firm of *T. W. Booker & Co.*, or with the mortgagees of my brother *T. W. Booker* and myself, for carrying on the businesses now or which may hereafter be carried on by the said firm as may to my said trustees or trustee, in the exercise of their or his discretion, appear most conducive to the interests of my estate." The testator then declared certain trusts of the proceeds of the sale and conversion of his estate, and he authorized his trustees or trustee to invest any moneys which might come to their or his hands in the purchase of lands, or by way of loan on security of freehold or leasehold property in *England* or *Wales*; and he appointed *Langley*, *Wellington*, and his wife executors and executrix of his will. The will contained no power of appointing new trustees. The testator died on the 19th of June, 1868. The will was proved on the 24th of May, 1870, by the widow alone, the other executors having renounced probate. On the 16th of June, 1870, *Langley* executed a deed-poll by which, after a recital that he had not proved the will or accepted the trusts thereof, or in any manner intermeddled with the estate of the testator, he did thereby absolutely renounce and disclaim all and every the real and personal estate, and all trusts and powers in or by the will devised or bequeathed to or vested in him, and did thereby declare that he absolutely renounced the offices of trustee and executor under the will. By a deed dated the 17th of June, 1870, and made between *Wellington* of the one part and Mrs. *Booker* of the other part, after a recital of the disclaimer by *Langley*, and a recital that *Wellington* desired to be discharged from the trusteeship of the will, and as retiring trustee to appoint Mrs. *Booker* to be a trustee thereof in his place, and that she had consented to act, it was witnessed that *Wellington* did thereby declare that he retired from the trusteeship of the will, and as such retiring trustee did thereby appoint Mrs. *Booker* to be a trustee of the will in his place. And he also thereby conveyed and assigned the trust property to her, upon the trusts of the will.

At the time of the death of the testator his firm owed £470,000

to their bankers, the *West of England and South Wales District Bank*, which was to a great extent secured by mortgages of the property of the firm.

On the 1st of July, 1872, an agreement was entered into between *T. W. Booker* and Mrs. *Booker*, the widow of *J. P. Booker*, of the first part, and *Samuel Burgess*, as trustee for a company then intended to be formed, and to be called *T. W. Booker & Co., Limited*, of the other part. This agreement contained a recital that *T. W. Booker* and Mrs. *Booker*, under the wills of *T. W. Booker-Blakemore* and *J. P. Booker*, were either jointly or separately seised of the freehold hereditaments comprised in the first schedule thereto, and were either jointly or separately possessed of the leasehold hereditaments, iron and tin plate works, coal and iron mines, collieries, and premises comprised in the second schedule thereto, and were either jointly or separately possessed of certain machinery, plant and tools, stock-in-trade, and of other coals and other minerals then in or upon the iron and tinplate works and other premises; and that it was intended to form a company called *T. W. Booker & Co., Limited*, for the purpose of carrying on the business of *T. W. Booker & Co.* And it was agreed that if the intended company should be formed and registered on or before the 18th of November, 1872, then, and in such case only, *T. W. Booker* and Mrs. *Booker* would sell to *Burgess*, as trustee on behalf of the company, all their estate and interest in the freehold and leasehold hereditaments comprised in the schedules, together with the said machinery, plant, &c., and the goodwill of the business of *T. W. Booker & Co.*, at the price of £425,000, which was to be paid £75,000 in cash, £200,000 in fully paid-up shares of the company, and £150,000 in debentures of the company, which were to be first charges on the freehold and leasehold hereditaments thereby agreed to be sold.

At the time when this contract was made the bank were creditors of the old firm of *T. W. Booker & Co.* to the extent of £443,898, and the contract could not therefore be carried into effect without their concurrence. This debt was secured by mortgages of the freehold and leasehold property of the firm.

On the 28th of October, 1872, an agreement was entered into between *T. W. Booker* and Mrs. *Booker* (the widow) of the one

FRY, J.
1883
WEST OF ENGLAND AND SOUTH WALES DISTRICT BANK v. MURCH.

part, and *J. P. Gilbert* and *John Dester*, the registered public officers of the bank, on behalf of the bank, of the other part, whereby it was agreed that, on the registration of the intended company, and upon the receipt by the bank of the debentures, paid-up shares, and £75,000 in cash, mentioned in the agreement of the 1st of July, 1872, the bank should release *T. W. Booker* and Mrs. *Booker* and the estate and effects of *J. P. Booker* from the payment of all moneys then due to the bank from *T. W. Booker* and Mrs. *Booker* or from the estate of *J. P. Booker*, and the bank, and *T. W. Booker* and Mrs. *Booker* should convey to the proposed company all their respective estates and interests of and in the hereditaments comprised in the agreement of the 1st of July, 1872; that the bank and Mrs. *Booker* and all other necessary parties should convey (free from all claims on the part of the bank) either to *T. W. Booker* in fee, or to the trustees of his marriage settlement, at his option, the hereditaments comprised in an agreement dated the 27th of September, 1872, and made between *Gilbert* of the one part and *T. W. Booker* of the other part, and that the trustees should thereupon release such of the hereditaments comprised in the agreement of the 1st of July, 1872, as were under or by virtue of the marriage settlement subject to the payment of a sum of £20,000 from that sum and all interest on it; that the bank should arrange for payment or satisfaction, either in cash or in shares or debentures of the proposed company, of all claims and demands by mortgagees, legatees, and annuitants upon the various properties and effects comprised in the agreement of the 1st of July, 1872, who had not agreed or would not agree to take payment in shares or debentures, and also for payment of all trade and other debts due and owing from the firm of *T. W. Booker & Co.*; that the debentures, shares, and cash payable as purchase-money under the agreement of the 1st of July, 1872 (save as after mentioned), together with the amount of the stock at the works, should be respectively made over and paid to the bank in satisfaction of all their claims and demands upon *T. W. Booker* and Mrs. *Booker*, or either of them, or the estate of *J. P. Booker*, and out of such debentures, shares, and cash the bank should discharge the mortgages, legacies, and trade and other debts before mentioned; that all mort-

gage securities held by the bank upon the properties comprised in the agreement of the 1st of July, 1872, should be released from the bank debts, claims, and dividends, but all other properties, including some policies of insurance on the life of *T. W. Booker* held by the bank as security, should remain their absolute property, and that 1000 shares of the proposed company out of those which were to be handed over to the bank, should stand in the name of *T. W. Booker* as his own absolute property free from any claim on the part of the bank; that if the value of the various properties comprised in the agreement of the 27th of September, 1872, should fall short of the sum of £20,000, the bank should make up to *T. W. Booker* or his trustees the difference, but if that value should exceed £20,000 the excess should be paid by *T. W. Booker* to the bank; that the bank should allow 4000 of the shares in the proposed company which were to be handed over to them to stand in the name of *T. W. Booker*, his executors or administrators, for the purpose of paying to the bank out of the dividends interest at 5 per cent. on the nominal value of the shares and the premiums on the policies on the life of *T. W. Booker* held by the bank, and that the balance of the dividends should be applied by *T. W. Booker*, his executors or administrators, in purchasing shares forming part of the 4000 at par (but and except and for the purposes therein mentioned *T. W. Booker*, his executors or administrators, should not have any beneficial interest in the 4000 shares); that the interest on the 4000 shares, or on so many as from time to time remained subject to the payment of the interest and premiums as aforesaid, should not be transferred or dealt with by *T. W. Booker*, his executors or administrators, without the written consent of the bank; that the dividends of any one half-year might be applicable to make up any deficiency in previous half-years, and if the dividends for six consecutive half-years should fall short of the amounts required to meet such interest and premiums the bank should be at liberty to call on *T. W. Booker* to execute, and he should thereupon execute, to them or their nominees a transfer of the 4000 shares, or so many as might from time to time be subject to the payment of the said interest and premiums, and the bank should from thenceforth hold the said shares as their own absolute

FRY, J.
1883
WEST OF ENGLAND AND SOUTH WALES DISTRICT BANK v. MURCH.

property; and that the bank should transfer to Mrs. *Booker* debentures representing £18,000, part of the debentures of the proposed company which were to be handed over to them, and should also pay her £2000 in cash.

These arrangements were afterwards modified as to the mode of payment of the purchase-money by the proposed company, the new arrangement being that the purchase-money should be paid as to £130,000 in paid-up shares, as to £150,000 in debentures, and as to £145,000 in cash, but in other respects the provisions of the agreements of the 1st of July, 1872, and the 28th of October, 1872, remained unaltered.

The proposed company was duly formed and registered, and the provisions of the two agreements were carried into effect. The bank also guaranteed to Mrs. *Booker* the payment of the debentures for £18,000 which she received, and in the subsequent winding-up of the bank she proved on this guarantee and received payment of the £18,000 from the liquidators of the bank.

Various conveyances and assignments to the company of the freehold and leasehold properties comprised in the agreement of the 1st of July, 1872, were afterwards executed by *T. W. Booker* and Mrs. *Booker*. The assignments of the leaseholds contained a recital that one undivided moiety of the property assigned was vested in *T. W. Booker* in his own right, and that the other moiety was vested in Mrs. *Booker* as the executrix and also as the trustee with full power of sale of the will of *J. P. Booker*, having been appointed by indenture of the 17th of June, 1870, and it was witnessed that *T. W. Booker* and Mrs. *Booker*, according to their respective shares and estates, assigned the property to the company. The conveyances of the freeholds contained a recital that *T. W. Booker* in his own right, and Mrs. *Booker* as the trustee with full power of sale of her late husband, were seised or possessed as tenants in common for an estate in fee simple in possession of the hereditaments thereby recited to be conveyed. And it was witnessed that *T. W. Booker* and Mrs. *Booker*, according to their respective shares and estates, did, and each of them did, thereby grant the property to the company. It was not stated in these deeds that Mrs. *Booker* was executrix of her husband or that the property was partnership property.

The properties comprised in the agreement of the 14th of September, 1881, for sale by the liquidators of *T. W. Booker & Co., Limited*, formed part of those which were comprised in the agreement of the 1st of July, 1872.

The purchasers took various objections to the title shewn by the liquidators, of which it is only necessary to refer to two: (1) that the appointment of Mrs. *Booker* as sole trustee of *J. P. Booker's* will was not a valid appointment under the power of appointing new trustees conferred by sect. 27 of *Lord Cranworth's Act* (23 & 24 Vict. c. 145); (2) that the sale for cash, shares, and debentures was not such a sale as was justified by the trust for sale declared by the will of *J. P. Booker*, and was a breach of trust.

Cookson, Q.C., and *A. R. Kirby*, for the purchasers:—

The appointment of a single trustee by the deed of the 17th of June, 1870, is not justified under the power conferred by sect. 27 (1)

(1) Sect. 27. "Whenever any trustee, either original or substituted, and whether appointed by the Court of Chancery or otherwise, shall die, or desire to be discharged from or refuse or become unfit or incapable to act in the trusts or powers in him reposed, before the same shall have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor or administrators or administrator of the last surviving and continuing trustee, or for the last retiring trustee, by writing to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or desiring to be discharged, or refusing or becoming unfit or incapable to act as aforesaid, and so often as any new trustee or trustees shall be so appointed as aforesaid all the trust property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors, or administrators of any trustee, shall with all convenient speed be conveyed, assigned, and transferred so that the same may be legally and effectually vested in such new trustee or trustees, either solely, or jointly with the surviving or continuing trustees or trustee, as the case may require; and every new trustee or trustees to be appointed as aforesaid, as well before as after such conveyance or assignment as aforesaid, and also every trustee appointed by the Court of Chancery, either before or after the passing of this Act, shall have the same powers, authorities, and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the deed, will, or other instrument creating the trust."

FRY, J.
1883
WEST OF ENGLAND AND SOUTH WALES DISTRICT BANK *v.* MURCH.

of *Lord Cranworth's Act* (23 & 24 Vict. c. 145). Where a testator has appointed two trustees one cannot be appointed in place of the two. The Court would not itself appoint a single trustee: *Earl of Lonsdale* v. *Beckett* (1). The testator himself excluded his widow from being a trustee. *In re Pool Bathurst's Estate* (2) is distinguishable.

[FRY, J., referred to *In re Cunningham* (3). But though an appointment of a single new trustee in place of a larger number may not be proper, still, as is said in *Lewin* on Trusts (4), *fieri non debuit, factum valet.*]

Davey, Q.C., and *W. Phipson Beale*, for the vendors:—

The question is, not whether the appointment of a single trustee was proper, but whether it was valid under sect. 27. The words of the power conferred by that section are almost identical with those of the power in *In re Cunningham*, and that case is an authority for the validity of the appointment. It is clearly authorized by sect. 27.

FRY, J.:—In my opinion the appointment of a single trustee was not invalid. I do not mean to say that such an appointment was one which ought to have been sanctioned by the Court or to have been made, but I think that it was within the power contained in sect. 27 of *Lord Cranworth's Act*. I come to this conclusion upon the language of the section itself. It is not confined to an appointment of the same number of trustees as before, and it gives to the trustees who are appointed under it the same powers as were possessed by the original trustees. If two trustees had been appointed under the power and the widow had been one of them, she, if she had been the survivor of the two, could have executed the trust for sale, and it seems absurd that she should not be able to do so when she alone is appointed a trustee. Then there is the case of *In re Cunningham*, which, it is true, is reported only in the *Weekly Notes*, but Mr. *Davey*, who was engaged as counsel in the case, has assured me that the report is correct, and that he is aware of two other cases in which the

(1) 4 De G & Sm. 73.
(2) 2 Sm. & Giff. 169.
(3) W. N. 1877, p. 258.
(4) 7th Ed. p. 567.

Master of the Rolls has decided in the same way. That case confirms my own view of the construction of sect. 27. I hold, therefore, that the appointment of Mrs. *Booker* was valid.

Cookson, Q.C., and *A. R. Kirby*, for the purchasers:—

The sale was not one which was authorized by the trust for sale. The trust authorized only a sale for money, not a sale for a consideration consisting in part of shares and debentures. The burden is on the vendors to shew that the sale was equivalent to a sale for cash.

[FRY, J.:—Suppose the transaction was a very reasonable one, but the precise money value of the consideration cannot be ascertained; is it not the presumption that it was a reasonable transaction?]

The vendors undertake to shew that it was reasonable: *Forshaw* v. *Higginson* (1) is distinguishable.

Davey, Q.C., and *W. Phipson Beale*, for the vendors:—

The objection is untenable. It comes only to this, that the conveyancing was not done as well as it might have been. In substance it is clear that a large benefit accrued to the estate of *J. P. Booker*. The property is clearly shewn to have been part of the partnership estate, and therefore the widow, as executrix, had power to sell it, freehold as well as leasehold.

This, however, is not essential to our case. After the death of *J. P. Booker*, if the business was not at once wound up it must have been carried on for the interest of his estate, as well as for the interest of the surviving partner, and the widow had power to enter into arrangements for carrying on the business. But, at any rate, the share of the deceased partner in the business could not be claimed without reimbursing the surviving partner who had carried on the business the debts which he had contracted in so doing. He carried on the business as a trustee for himself and the estate of the deceased partner. The widow, as the representative of her deceased husband, got the benefit of the reduction in the debt to the bank which took place between his death and the sale to the limited company. It may be true that, as a general rule, a trustee,

(1) 8 D. M. & G. 827.

FRY, J.
1883
WEST OF ENGLAND AND SOUTH WALES DISTRICT BANK v. MURCH.

who is to sell and convert into money, and to hold the proceeds of sale on certain trusts, cannot sell for a consideration consisting of shares in a limited company, but that is because he is not at liberty to embark the testator's estate in a commercial speculation. If that would not be the effect of his selling for such a consideration, the general rule does not apply. Here the bank took the shares and debentures in satisfaction of the debt due to them. The debentures were a charge on the property which was sold. The utmost that can be said is that the trustee committed a breach of trust by investing on an unauthorized security. The breach of trust has been repaired. The bank guaranteed the payment of the debentures which the widow took, and she has since received the money for them. There was only an equity of redemption to sell, and as the mortgagees agreed to take the shares and debentures in payment of their debt, the sale was in a circuitous way a sale for cash, and there was no breach of trust. The characters of trustee and executor were united in the widow, and one way or the other she could make a good title: *Robinson* v. *Lowater* (1); *Colyer* v. *Finch* (2); *Corser* v. *Cartwright* (3); *In re Alison* (4). The only question is whether the estate passed out of the right person with the assent of the right person. The will contained an overriding charge of debts on the real estate, and therefore the widow had power to sell and make a good title under the provisions of *Lord St. Leonards' Act* (22 & 23 Vict. c. 35), ss. 14–17, combined with sect. 30 of *Lord Cranworth's Act*. It was the first duty of the widow to discharge the liabilities to which her testator's estate was subject, and a large business such as this was could not be readily sold. Under ordinary circumstances it could only be sold to a company. It was her duty to get the best price she could. Why could she not make an arrangement with the mortgagees for releasing the estate from all its liabilities? There was a complete accord and satisfaction. It was really a sale of all the trust estate for £20,000, the payment of £18,000 of it being postponed with a good guarantee. In substance the widow got £20,000 for that which was worth nothing, and the *cestuis que trust* cannot complain. It was a sale for cash, part of which

(1) 5 D. M. & G. 272.
(2) 5 H. L. C. 905.
(3) Law Rep. 7 H. L. 731.
(4) 11 Ch. D. 284.

was to be temporarily invested in debentures. It is said that the widow did not get her proper proportion of the purchase-money, but the Court cannot go into that question.

Everitt, Q.C., and *E. Ford*, for the Defendants:—

The sale was really made by the widow as executrix for the payment of debts, and she could not have obtained so large a price in any other way. She was entitled to sell without regard to the interests of the *cestuis que trust*, and with regard solely to the interests of the creditors. A mortgagee is entitled to sell and to leave the bulk of the purchase-money secured on the property which is sold, and an executrix with a charge of debts stands in the position of a mortgagee on behalf of the creditors: *Davey* v. *Durrant* (1); *Thurlow* v. *Mackeson* (2). The widow was entitled as executrix to sell under the charge of debts. The principle of *Corser* v. *Cartwright* (3) applies. A course of dealing with real estate may be such as to make it partnership assets: *Davies* v. *Games* (4).

Cookson, in reply:—

The sale was not valid under the trust for sale. The effect of it was to embark the testator's property in a contributory mortgage. That could not be done, nor could the estate be invested in such a mortgage as a debenture of a company: *Lewin* on Trusts (5). The fact that the debentures were guaranteed by the bank makes no difference. *Thurlow* v. *Mackeson* is distinguishable. There the original contract was to call for cash, and then a different arrangement was *bonâ fide* substituted, and it was held that this did not vitiate the transaction. No authority has been produced which shews that under a trust to sell for cash a sale can be made for cash, debentures, and shares.

It is said that the widow sold as executrix, either under her general power, or by force of *Lord St. Leonards' Act*. But the instruments contradict this, and shew that she was selling as trustee, at any rate as regarded the freeholds. In *Corser* v. *Cartwright* there was no reference in the conveyance to the fact that

(1) 1 De G. & J. 535.
(2) Law Rep. 4 Q. B. 97.
(3) Law Rep. 7 H. L. 731.
(4) 12 Ch. D. 813.
(5) 7th Ed. p. 299.

FRY, J.
1883
WEST OF ENGLAND AND SOUTH WALES DISTRICT BANK v. MURCH.

the devisee was executor, and the sole question was whether he could give a good discharge for the purchase-money. The money had in fact reached the proper hand, though that was not disclosed on the face of the deed, and the Court held that that was enough. But it is quite a different thing when a person, who is executrix, professes to sell in her other character of trustee; the Court will not then attribute to her that she was selling in the character of executrix, in which she might have acted, but did not profess to be acting. Under a charge of debts an executor has no power to convey the estate, when there is a devisee of the legal estate: *Colyer* v. *Finch* (1); *Lewin* on Trusts (2). Sect. 14 of *Lord St. Leonards' Act* does not apply, or at any rate it carries the case no further than the express trust does. The statutory power is in truth more limited. Nor does sect. 16 apply.

There cannot be concurrent express and implied powers of sale: *Hodkinson* v. *Quinn* (3). The question is, not as to the legal estate, but as to the equitable interest. At law an executor could not wind up his testator's estate in this way; he could not compound a debt, nor could he sell the estate for cash and debentures, and the power which sect. 30 of *Lord Cranworth's Act* gives to an executor to compromise or compound is a very limited one. The arrangement was not a fair one, for under it *T. W. Booker* got a much larger benefit than did the estate of *J. P. Booker*, and it must be assumed that the two partners were equally interested in the partnership assets.

FRY, J., after stating the facts, continued:—

It is obvious that the result of the transaction of 1872 was this. Mr. and Mrs. *Booker* sold their partnership property to the bank; they settled the whole of the claim which the bank had upon them; they made an arrangement for the payment of their other creditors, and they got back from the bank certain benefits which as between themselves were of unequal value. The deeds by which the *Bookers* conveyed the property to the new company, as far as they related to leaseholds, shew that Mrs. *Booker* was acting in the double character of executrix and trustee, but, as to

(1) 5 H. L. C. 905. (2) 7th Ed. p. 418 *et seq.*
(3) 1 J. & H. 303.

the freeholds, she appears to be acting as trustee only. The question is whether the transaction can be upheld. This question is very much simplified by the fact that the property with which I am now concerned is shewn to have been partnership property. The transaction which was entered into appears to me to have been within the competency of Mrs. *Booker* as executrix. In the first place, it is plain that as executrix she could sell the whole of the partnership property, whether freehold or leasehold. That cannot be disputed. She did sell it, but she did not sell it for cash. In lieu of that she sold it for certain other property, by means of which she entered into a compromise with her creditors. As executrix, acting under *Lord Cranworth's Act*, she had power to compromise the claim of the bank. It appears to me that the effect of what she did was, in consideration of the conveyance of these partnership assets, to obtain certain other property with which she entered into a compromise with the bank. The other aspect of the transaction is the arrangement into which she entered with Mr. *Thomas William Booker*. It is said that that arrangement gave unequal benefits to the two partners. That is perfectly true. It is said that it must be presumed that their interests in the partnership were equal. I know not why such a presumption should be made by the Court. I have no doubt that there were unsettled partnership accounts which must have been taken between Mrs. *Booker* and Mr. *Thomas William Booker* if she had not entered into this compromise with him. Under *Lord Cranworth's Act* she had power to compromise, and by the arrangement into which she then entered, she did compromise any questions between herself and Mr. *T. W. Booker*. I regard the transactions as in substance a compromise by the executrix with the bank and with her deceased husband's co-partner. Then it is said that if she had power so to do, yet, by omitting to state in the deeds by which she conveyed the freehold property that she was acting as executrix, she precluded herself from asserting that she was acting in that character. In my judgment she did not.

It must be borne in mind that, as executrix, hers clearly was the hand to receive the purchase moneys, and therefore those moneys came to the right hand, the hand of the person whose

FRY, J.
1883
WEST OF ENGLAND AND SOUTH WALES DISTRICT BANK v. MURCH.

duty it was duly to apply the assets in satisfaction of the creditors of the deceased as well as of the beneficiaries under his will. Moreover, whether she was acting as trustee or as executrix, she was under an obligation to do the best she could for the estate. Her fiduciary character was substantially the same whether she was acting as executrix or as trustee. I think, therefore, that I should be straining at a gnat if I were to hold that the mere fact that she spoke of herself in the instruments as trustee and not as executrix, was enough to prevent the validity of a transaction which, in her character of executrix, I hold that she had the power of carrying into effect.

If authority is wanted, I confess it appears to me that the case of *Corser* v. *Cartwright* (1) is an authority in favour of this view, though I have listened very attentively to Mr. *Cookson's* argument that that case has nothing to do with the present. In that case a man who was executor of his father and also devisee of his residuary real estate, subject to a charge of debts, affected to mortgage part of the devised estate as beneficial owner, and in that character he received the mortgage money, and spent it for his own purposes. But, inasmuch as there was a charge of debts, and he had the legal estate, and was also executor, it was held that he had not only parted with the legal estate, but that he was able to make a good conveyance of the equitable interest, because his was the proper hand to receive the money. It appears to me that Lord Chancellor *Cairns* puts his judgment entirely on the fact that the same person was executor and had the legal estate. He says (2), "I find him selling or mortgaging, and I find him, beyond all doubt, able to sell and able to give to a mortgagee a good title to the legal estate." So here, I find the trustee having the legal estate, and able, therefore, to convey the legal estate. The Lord Chancellor goes on: "I find that that legal estate is in his hands, and therefore any money that is produced by the sale or mortgage of that legal estate is subject to and chargeable with the payment of debts and legacies, and that therefore the money coming into his hands must be money which ought to be applied to the payment of debts and legacies." So I find here; the

(1) Law Rep. 7 H. L. 731. (2) Law Rep. 7 H. L. 740.

money came to the hands of the person who was bound to pay the debts and legacies. Then Lord *Cairns* proceeds: "But then I find that he himself is an executor of the testator; that he himself is the person who ought to hold assets impressed with the liability to satisfy debts and legacies. I find, therefore, that assets which ought to be applied to the payment of debts have come into the hands of an executor, and that he has given a receipt for them. Therefore, on the one hand, the mortgagees have got the legal estate; and, on the other hand, they have got a receipt from the proper person for money which ought to be applied to the payment of debts and legacies. That being so, it appears to me that their title is entire and complete, without entering into any farther consideration of the question what might have been the case of a sale being attempted of other parts of the estate not comprised in the residuary devise." So here, I find the executrix had the power to enter into this transaction. I find that the legal estate passed from her, because she held it as trustee, and the money reached the hands of the person who was bound to distribute it among the persons entitled to it. I therefore overrule this objection.

Solicitors for purchasers: *Ashurst, Morris, & Co.*

Solicitors for vendors: *Clarke, Woodcock, & Ryland,* agents for *Fussell, Prichard, & Co., Bristol.*

Solicitors for Defendants: *Rogers & Chave.*

W. L. C.

FRY, J.
1883
Feb. 12.

In re CARRIAGE CO-OPERATIVE SUPPLY ASSOCIATION.

Ex parte CLEMENCE.

Company—Winding-up—Landlord—Distress for Rent—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 85, 163 [*Revised Ed. Statutes, vol. xiv. pp.* 222, 238].

The rule that a landlord will not be allowed to realize a distress for rent levied on the goods of a company between the presentation of a winding-up petition and the making of a winding-up order, if he is a creditor entitled to prove in the winding-up for the rent distrained for:—

Held, not to apply to a case in which the company were not tenants of the landlord (but undertenants of his lessee), and the landlord had accepted as collateral security for the overdue rent a promissory note of the company upon which he was entitled to prove in the winding-up:

Held, that in such a case the landlord ought to be allowed to realize his distress.

MOTION.

On the 1st of August, 1878, *John Clemence* demised to *William Catt* and *J. W. Boyfield* three houses in *Long Acre*, for a term of twenty-one years from the 25th of March, 1878, at the yearly rent of £600, payable quarterly.

On the 29th of May, 1880, *Catt* and *Boyfield* entered into an agreement to grant an underlease of the demised premises to a trustee for and on behalf of a company, then intended to be formed and to be called the *Carriage Co-operative Supply Association*. The company was incorporated by registration under the *Companies Acts* on the 26th of May, 1880, and they entered into possession of the demised premises. A large arrear of rent was due to the original lessor, and some negotiations with reference to its payment took place, the result of which was that on the 28th of December, 1880, the company paid him £450, and gave him a promissory note for £450, these two sums representing the rent due under the original lease up to the 25th of December, 1880.

The promissory note was signed by two of the directors of the company on behalf of the company, and was in the following terms:—

"28th Dec. 1880.

"We as directors for and on behalf of the *Carriage Co-operative Supply Association, Limited*, promise to pay to Mr. *John Clemence*, or order, the sum of £450, by instalments, and in the following manner,—the instalment or sum of £150 in six weeks from the date hereof; the further instalment or sum of £150 in nineteen weeks from the date hereof; and the balance of £150 in thirty-two weeks from the date hereof. In default of payment of any one instalment or sum when the same becomes due, then the whole amount remaining unpaid is to become due and payable in one sum."

Clemence did not agree to accept the company as his tenants, but, as the Court held upon the evidence, he only agreed to accept the promissory note as collateral security for the £450 unpaid rent.

On the 24th of December, 1880, the company had executed a bill of sale of some carriages belonging to them, which were on the demised premises, to *Joseph Brown*, as security for the sum of £800 advanced by him to them.

The first instalment of £150 secured by the promissory note was not paid by the company when it became due. On the 10th and 11th of March, 1881, two petitions were presented by creditors for the winding-up of the company. On the 24th of March, 1881, the executors of *Clemence* (who was then dead) distrained on the demised premises for £450, the arrears of rent then due, and seized some carriages which were comprised in the bill of sale to *Brown*, and of which he was then in possession. On the 26th of March, 1881, an order for the compulsory winding-up of the company was made on the two petitions.

On the 13th of May, 1881, on the application of *Brown* in the winding-up, an order was made that he should be at liberty to sell the carriages comprised in the bill of sale, he undertaking to pay £450 out of the proceeds of sale into Court to abide the order of the Court, and that the executors of *Clemence* should have the same rights against the proceeds of sale as against the carriages.

The executors then gave notice of motion that, notwithstanding this order, they might be at liberty to proceed to a sale of the carriages seized under their distress. Before the motion was

FRY, J.
1883
In re CARRIAGE CO-OPERATIVE SUPPLY ASSOCIATION. *Ex parte* CLEMENCE.

heard the carriages had been sold by *Brown*, and the £450 paid into Court.

Cookson, Q.C., and *Stirling*, for the motion:—

The promissory note was not an extinguishment of the debt in law. The right to enforce the distress depends on the question whether the landlord was the landlord of the company or a stranger to them. If he is the company's landlord he can prove for the rent due to him as a creditor, and he will not be allowed to distrain; if he is a stranger he cannot prove as a creditor, and he will be allowed to distrain: *In re Exhall Coal Mining Company* (1); *In re Oak Pits Colliery Company* (2); *In re Regent United Service Stores* (3); *In re Lundy Granite Company* (4). If after the commencement of a winding-up the liquidator continues in possession of the company's leasehold property and uses it, the landlord can distrain for rent accruing after the winding-up. The company merely gave collateral security for the overdue rent; *Clemence* never accepted them as tenants. There was no *animus novandi*.

[FRY, J.:—The executors are creditors of the company upon the promissory note.]

They are not creditors in the character of landlords, but on an independent contract. That ought not to deprive them of the right to distrain.

Moreover, the goods were not the company's goods; they were the goods of *Brown* under the bill of sale: *In re Regent United Service Stores*.

Cozens-Hardy, Q.C., and *T. L. Wilkinson*, for *Brown*:—

The applicants are creditors of the company on the promissory note for the amount of the rent, and there was a present right of action on the note; sects. 85 and 163 of the *Companies Act*, 1862, are wide enough to apply to this case; *In re Traders' North Staffordshire Carrying Company* (5). By accepting the promissory note the landlord ceased to be a stranger to the company.

(1) 4 D. J. & S. 377.
(2) 21 Ch. D. 322.
(3) 8 Ch. D. 616.
(4) Law Rep. 6 Ch. 462.
(5) Law Rep. 19 Eq. 60.

The goods were the goods of the company, subject to the mortgage. *In re Regent United Service Stores* (1) is distinguishable; there the goods had been deposited by tradesmen with the company to be sold on commission. The distress was levied on the goods themselves, not on *Brown's* interest in them. The law does not recognise such a thing as a distress on an equity of redemption. A distress can only be levied on the specific chattels, not on the partial interest of any person in them. *Brown* could not deal with the goods without the leave of the Court.

E. Ford, for the Company.

FRY, J.:—

The question now raised is in form a new one, and it is not entirely free from difficulty. The language of sect. 163 is no doubt very large, but the Courts have, notwithstanding, felt themselves at liberty, or rather, I should say, they have felt constrained, to put an equitable construction on it, and the result of the decisions is this, that if the landlord be a stranger to the company he is allowed to avail himself of a distress put in after the commencement of the winding-up; but if he have a right to prove for his rent in the winding-up he is not allowed to have the benefit of his distress. The question which now arises is whether, if the landlord have a right of proof in the winding-up upon a collateral security for the rent given by the company, he ought to be deprived of his right of distress? I must apply the same equitable principles, and I must give effect to the landlord's independent right of distress. If I were to deprive him of his right of distress as a landlord against the goods of third persons, because he has a collateral right against the company, I think I should be doing that which is inequitable. As regards the original right of distress the company were strangers to the landlord, which brings this case within the first of the two classes of cases to which I have referred. My conclusion on the facts is that the landlord's right of proof is upon a collateral security; for I think he said distinctly that he would not assent to taking the

(1) 8 Ch. D. 616.

FRY, J.
1883
In re CARRIAGE CO-OPERATIVE SUPPLY ASSOCIATION. *Ex parte* CLEMENCE.

company as his tenants; I think that the promissory note was accepted only as a collateral security and not as an extinguishment of the debt. Looking at all the circumstances, it appears to me reasonably plain that there was no intention of extinguishing the original debt, though the landlord was willing to take a collateral security for it from the company. I hold, therefore, that there has been no extinguishment of the debt, and that the applicants are entitled to the benefit of their distress.

Solicitors for Applicants: *Nickinson, Prall, & Nickinson.*
Solicitor for *Brown*: *W. Maynard.*
Solicitor for Liquidator: *C. Harcourt.*

W. L. C.

FRY, J.
1883
Feb. 20, 21; *March* 3.

In re VISCOUNT EXMOUTH. VISCOUNT EXMOUTH *v.* PRAED.

[1882 E. 1435.]

Heirlooms—Trust—Validity—Condition subsequent—Uncertainty.

When a trust is created to secure the devolution of chattels as heirlooms, any limitations which are to take effect by way of postponement or defeazance of an absolute interest are subject to all the rules which govern the validity of conditions subsequent.

Such limitations, therefore, must be certain, not only in expression, but also in operation, and it is essential to their validity that it should be capable of ascertainment at any given moment of time whether the limitation has or has not taken effect.

A testator, who was a peer, bequeathed chattels to trustees, upon trust to permit and suffer the same to go and be held and enjoyed with the title, so far as the rules of law and equity would admit, by the person who for the time being should be actually possessed of the title, in the nature of heirlooms, and so that no person in existence at the time of the testator's decease, or born in due time afterwards, and afterwards coming to the title, should have any other than a life interest in the same, and so that no person should acquire an absolute interest in the same till the expiration of twenty-one years after the decease of all such persons as should be in existence at the time of the testator's decease and afterwards attaining the title:—

Held, that the latter clause of the limitations was void for uncertainty in operation, and that the first person born after the death of the testator

who attained the title acquired an absolute interest in the chattels, notwithstanding that there was still living a person who was alive at the time of the testator's death, and who was capable of inheriting the title.

MOTION FOR JUDGMENT.

In the year 1814 Sir *Edward Pellew* was raised to the peerage by the title of Baron *Exmouth*, and in 1816 he was also created Viscount *Exmouth*, the title in each case being limited to him and the heirs male of his body. He died in 1833, and the title then devolved on his eldest son *Pownoll Bastard*, who thereupon became the second Viscount *Exmouth*. The second Viscount, by his will, dated the 26th of April, 1833, bequeathed to three trustees, their executors, administrators, and assigns, a piece of plate which had been presented to his father, some jewels, a diamond-hilted sword, which had been given to his father by the City of *London*, some other swords, two of which had once belonged to the Dey of *Algiers*, a cameo and two vases, which had been given to his father by the Pope of *Rome*, the insignia of the different orders of knighthood belonging to his father, and a portrait of his father painted by Sir *Thomas Lawrence*, "Upon trust to permit and suffer the same to go and be held and enjoyed with the title and honours of *Exmouth*, so far as the rules of law and equity will admit, by the person who for the time being shall be actually possessed of the said title, in the nature of heir-looms, and so that no person in existence at the time of my decease, or born in due time afterwards, and afterwards coming to the said title, shall have any other than a life interest in the same, and so that no person shall acquire an absolute interest in the same till the expiration of twenty-one years after the decease of all such persons as shall be in existence at the time of my decease and afterwards attaining the said title."

The testator died on the 2nd of December, 1833, and his eldest son *Edward* then became the third Viscount *Exmouth*. The third Viscount died on the 11th of February, 1876, without ever having had any issue, and he was succeeded in the title by his nephew *Edward Fleetwood Pellew*, the eldest son of his brother *Fleetwood John Pellew*, who had predeceased him, and *Edward Fleetwood Pellew* thereupon became the fourth Viscount. He was

FRY, J.
1883
In re VISCOUNT EXMOUTH.
VISCOUNT EXMOUTH *v.* PRAED.

born on the 24th of June, 1861, and attained the age of twenty-one on the 24th of June, 1882.

This action was brought by the fourth Viscount against the trustees of the will of the second Viscount and the Plaintiff's only brother, who was an infant, and who was the next heir presumptive to the title, the fourth Viscount not having been married, to have the trusts affecting the chattels bequeathed as heirlooms by the will of the second Viscount carried into execution under the direction of the Court. The main object of the action was to determine whether the Plaintiff was or was not absolutely entitled to the chattels bequeathed by the will of the second Viscount as heirlooms.

At the time when the action was commenced there was living *Henry Edward Pellew*, a nephew of the second Viscount, on whom the title would have devolved if the fourth Viscount and his brother had been dead without issue. *Henry Edward Pellew* was living at the death of the second Viscount. There were also still living at the date of the commencement of the action other male descendants of the first Viscount who had been living at the time of the death of the second Viscount.

Everitt, Q.C., and *F. Vaughan Hawkins*, for the Plaintiff:—

The Plaintiff is entitled to the chattels absolutely, both on the true construction of the clause, and because any other construction would violate the rule against perpetuities. The trust is executed, not executory. The Plaintiff was born more than twenty-one years after the death of the testator, and the first restriction of the interest to be taken under the trust to a life interest does not apply to him.

[FRY, J.:—Can I determine whether you are absolutely entitled until the expiration of the period of twenty-one years which is to run from the death of the last of the persons alive at the time of the testator's death who were capable of attaining the title? How can I tell whether the Plaintiff will be alive at the end of the twenty-one years? Does any one dispute your title to the present use of the chattels?]

No. But the Court must determine whether I am now abso-

lutely entitled to them, and in doing so it will incidentally determine the extent of my interest: *East* v. *Twyford* (1); *Shelley* v. *Shelley* (2).

[*Cookson*, Q.C., referred to *Hampton* v. *Holman* (3).]

The decision of the question whether the Plaintiff's title is indefeasible ought not to be postponed till the end of the twenty-one years. The Court ought to decide in what event the gift over is to take effect. The effect is to give the Plaintiff what would be an estate tail in the case of land, *i.e.*, an absolute interest in the chattels. If the persons referred to in the last clause of the trust should not attain the title the twenty-one years would never begin to run at all. At any rate, the period can run only from the death of the first person who attained the title after the death of the testator, and on whose death the Plaintiff attained the title. The Plaintiff would then be absolutely entitled, subject to a divesting clause in case he should die within twenty-one years from the death of the third Viscount. *Primâ facie*, but for the controlling clause at the end, the Plaintiff would take absolutely: *Tollemache* v. *Coventry* (4). Then comes the controlling clause, and by it the divesting is to take place on the happening of an event which may never happen, for it is possible that none of the other persons who were alive at the time of the testator's death and capable of attaining the title may ever attain it. Such a divesting clause is inoperative: *Pinbury* v. *Elkin* (5).

The ultimate limitation is also contrary to the rule against perpetuities. It might after the Plaintiff's death still be uncertain what his interest in the chattels was: *Blight* v. *Hartnoll* (6).

Cookson, Q.C., and *Coltman*, for the infant Defendant:—

[FRY, J.:—The point on which I wish to hear you is whether the ultimate clause of the gift is not void for uncertainty. You can never ascertain when the twenty-one years will commence to run.]

The uncertainty is no objection to the gift if the chattels must

(1) 4 H. L. C. 517.
(2) Law Rep. 6 Eq. 540.
(3) 5 Ch. D. 183.
(4) 2 Cl. & F. 611.
(5) 1 P. Wms. 563.
(6) 19 Ch. D. 294.

FRY, J.
1883
In re VISCOUNT EXMOUTH.
VISCOUNT EXMOUTH *v.* PRAED.

vest within the legal period of a life or lives in being and twenty-one years afterwards. This they clearly will do, and therefore there is no violation of the rule of perpetuities. Every person who was alive at the death of the testator, and who acquired an interest in the chattels under the trust, took a life interest in them, and every other person who should acquire an interest took an absolute interest liable to be defeated in the event of any other person who was alive at the time of the testator's death attaining to the title. The trust continues for twenty-one years after the death of the last of the persons living at the time of the testator's death who attains to the title, and then the interest must be absolutely vested.

F. W. B. Praed, for the trustees.

Everitt, in reply:—

The events which have happened shew that they could not have been in the contemplation of the testator. His intention was to divest the chattels only for the purpose of carrying them over to the next successor for the time being to the title, and then, according to *Tollemache* v. *Coventry* (1), the result is that, but for the last proviso, they would vest absolutely in the first person not in existence at the time of the testator's death who attained the title. Therefore the Plaintiff takes absolutely, unless the subsequent clause of defeasance fits, and it does not: *In re Catt's Trusts* (2). The chattels must vest absolutely as soon as they come to a person who was not born during the testator's lifetime.

Mar. 3. FRY, J., after stating the facts, and reading the clause in the will, continued:—

The clause which I have just read divides itself into three parts, which require separate attention. The first is the trust "to permit and suffer the property to go and be held and enjoyed with the title and honours of *Exmouth*, so far as the rules of law and equity will admit, by the person for the time being actually possessed of the said title, in the nature of heirlooms." There can,

(1) 2 Cl. & F. 611. (2) 2 H. & M. 46.

in my judgment, be no doubt that the effect of that clause, standing alone, would be to give an absolute interest in the chattels to the first person who succeeded to the honours, and that, therefore, if it had stood alone, the third Viscount would have become absolutely possessed of these chattels. That, I think, follows from the case of *Tollemache* v. *Coventry* (1), to which Mr. *Everitt* referred me. Then the second clause is in these terms, "so that no person in existence at the time of my decease, or born in due time afterwards, and afterwards coming to the said title, shall have any other than a life interest in the same." That clearly reduces the absolute interest which would have been taken by a person in existence at the time of the testator's decease to a life interest, and, accordingly, the third Viscount took, not an absolute, but a life interest in the chattels in question. The third clause says that "no person shall acquire an absolute interest in the same till the expiration of twenty-one years after the decease of all such persons as shall be in existence at the time of my decease, and afterwards attaining the said title." It may, I think, be paraphrased in this way, "that no person shall acquire an absolute interest till the expiration of twenty-one years from the decease of all such persons as shall be in existence at the time of my decease, and shall at any time after my decease attain the said title." It appears to me that the last words of the clause are indefinite as to time. If that clause be good I think that the present Viscount has not attained an absolute interest, and cannot demand the delivery of the chattels from the trustees, because it is plain that twenty-one years from the death of the third Viscount, who died in 1876, have not expired, and consequently there is at least one person who was living at the death of the second Viscount and has attained the title who did not die twenty-one years ago. But the question is whether that clause is good, and, in my judgment, it is invalid and inoperative. I must, in the first place, inquire what is the nature of the clause. It appears to me that it is a contingent limitation by way of trust in the nature of a clause of postponement and defeasance. It postpones the vesting of an absolute interest in the person who may afterwards take the absolute interest, supposing he survives the twenty-one years, and

(1) 2 Cl. & F. 611.

FRY, J.
1883
In re VISCOUNT EXMOUTH.
VISCOUNT EXMOUTH *v.* PRAED.

who, but for the clause, would have taken the absolute interest at the moment of his coming into possession. So that, applying it to the actual circumstances, the present Viscount, supposing the clause is good, would, but for it, have taken an absolute interest in the chattels on his coming into the title, but, by virtue of the clause, will not take an absolute interest till the expiration of, at any rate, twenty-one years from the death of his predecessor. In the next place, it is a clause of defeasance, because, supposing the person who would have taken absolutely on acquiring the title does not survive the period of twenty-one years, the absolute interest will never have vested in him, and, therefore, to take the instance of the present actual possessor of the title, if the present Viscount should not survive the term of twenty-one years from the death of the late Viscount, his absolute interest would be defeated. Such contingent limitations in the nature of defeasances are, in my view, subject to all the rules which apply to conditions subsequent. One of those rules I understand to be this, that the condition must be clear and certain. That, in my opinion, includes, not only certainty of expression in the creation of the limitation, but also certainty in its operation. It must be such a limitation that, at any given moment of time, it is ascertainable whether the limitation has or has not taken effect. But as to this contingent limitation it cannot always be ascertained whether it has or has not taken effect, and therefore I hold it void.

Let me go back to those propositions which, if they are correct, determine the case, in order to illustrate them a little more fully. In the first place, is such a limitation as this subject to the rules which are applicable to conditions subsequent? I will refer to a passage in the judgment of Lord *St. Leonards* in the well-known case of *Egerton* v. *Earl Brownlow* (1). He said (2): "I know, by the authorities which have been referred to, that conditions which were intended to defeat an estate have defeated an estate in contingency just as much as a vested estate; that they are odious, as it is said, in law, and as it is also said, by equally high authorities, the Institutes and *Sheppard's* Touchstone, that they must be submitted to a

(1) 4 H. L. C. 1. (2) 4 H. L. C. 208.

strict construction; that is, you are not to give a favourable construction to a proviso the object of which is to defeat an estate already created; but that, if that estate is to be defeated, it must be so by clear and express terms, within the limits of the instrument creating it." In *Clavering* v. *Ellison* (1), originally before Vice-Chancellor *Kindersley*, the question arose upon limitations no doubt somewhat different from those now before me. The nature of those limitations the Vice-Chancellor expressed in these words: "The estates and interests are, by the previous part of the will, clearly and distinctly given to the children as they come into *esse*, by way of vested remainder, and the proviso is intended to defeat those estates, and to accelerate the subsequent limitations." And then, having referred to the expression used in some of the older authorities, that such limitations are odious to the law, he said, "If such be a clear rule, it appears to me to be an equally clear principle, that the contingency on which such a limitation is to take effect should be something definite and certain, that the contingency should be so expressed as not to leave it in any degree doubtful or uncertain what the contingency is which is intended to defeat the prior estate." No doubt there the want of certainty was rather in the expression used than in the ascertainment of the operation of the limitation. But it is quite plain certainty in the one is as essential as certainty in the other. That case went to the Court of Appeal, and the decision of the Vice-Chancellor was affirmed by the Lords Justices (2). It then went to the House of Lords, and the decision of the Lords Justices was affirmed by the House, and in addressing the House of Lords Lord *Cranworth* used this language (3): "I consider that, from the earliest times, one of the cardinal rules on the subject has been this: that where a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must be such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine."

In the next place let me inquire whether, in the present instance, it is ascertainable at any given time whether the contingency

(1) 4 Drew. 451, 469. (2) 8 D. M. & G. 662.
(3) 7 H. L. C. 707, 725.

FRY, J.
1883
In re VISCOUNT EXMOUTH.
VISCOUNT EXMOUTH *v.* PRAED.

has or has not happened. Nothing can illustrate better the difficulty in the way of this proviso than the actual circumstances of the case. When the third Viscount died there were living persons, one of whom at least is still living, who were in the entail, some of them before and some of them after the present Viscount; that is, their interest would take effect (if at all) some before and some after that of the present Viscount. It follows, therefore, that you cannot, at every given time, tell whether the interests of all the persons named by the testator from the death of the last of whom the twenty-one years is to commence, have or have not expired. Suppose, for instance, the present Viscount should live to the year 1897, which will be twenty-one years from 1876, when the third Viscount died, and suppose that *Henry Edward Pellew* should be then living, to whom will the chattels belong? No human being could answer the question. Whether *Henry Edward Pellew* would be one of the persons who was living at the death of the testator and who afterwards attained the title nobody can tell. It is known that he was living at the death of the testator, but whether he would live to attain the title would not be within human knowledge. In 1897, therefore, it is possible that the period of twenty-one years will have expired, but it is equally possible that it may never have begun to run, and that no one will be able to say which has happened. Again, supposing that the present Viscount, having lived to 1897, should die immediately afterwards, to whom would the chattels belong? Would they belong to his legal personal representative? They would if the period of twenty-one years had expired. Would they belong to his successor in the title? They would if that period had not expired. Therefore, from the death of the first of the class of persons indicated by the will down to the expiration of twenty-one years from the death of the last of the persons who may possibly attain the title the whole question of the possession of these chattels would be in uncertainty. In my judgment that is such an uncertainty in this condition or defeasance as prevents it from being clear and certain, and renders it inoperative.

I hold, therefore, that the third clause in the trust is inoperative, and that the Plaintiff is now absolutely entitled to the chattels.

One further observation I ought to make, and it is this. An argument was addressed to me upon this third clause, with the view of shewing that upon its true construction the present Viscount is absolutely entitled to the chattels. I have not dealt with that argument in my judgment, because, by reason, I suppose, of some intellectual defect on my part, I could never from first to last understand what the point was, and I only advert to it now in order to say that I should have given a more elaborate judgment upon it if I had been able to understand it.

Solicitors for all parties: *Farrer & Co.*

W. L. C.

In re SOUTH-EASTERN RAILWAY COMPANY. *Ex parte* SOMERVILLE.

Railway Company—Costs of Conveyance—Taxation—Lands Clauses Consolidation Act, 1845, *s.* 83 [*Revised Ed. Statutes, vol. ix. p.* 647].

A railway company cannot under the 83rd section of the *Lands Clauses Consolidation Act*, tax the costs of conveyance after payment by them of the costs.

THE *South-Eastern Railway Company* had paid the costs of the conveyance of land to them, and had obtained a common order to have the said costs taxed under the provisions of sect. 83 of the *Lands Clauses Consolidation Act*, 1845.

The solicitor of the landowner, whose costs had been taxed, applied to set aside the order as irregular.

Simmonds, for the summons.

Mitchell, for the company.

FRY, J.:—

The present application is one to set aside an order of taxation obtained as of course under the *Lands Clauses Consolidation Act*, it being admitted that the order cannot be sustained as an order of course under the *Attorneys' Act*. The whole question, therefore, turns on the 83rd section of the *Lands Clauses Consolidation Act*,

FRY, J.
1883
In re SOUTH-EASTERN RAILWAY CO. *Ex parte* SOMERVILLE.

1845, and that, so far as is material, is in these words: "If the promoters of the undertaking and the party entitled to any such costs shall not agree as to the amount thereof, such costs shall be taxed by one of the Taxing Masters of the Court of Chancery or by a Master in Chancery in *Ireland*, upon an order of the same Court to be obtained upon petition in a summary way by either of the parties; and the promoters of the undertaking shall pay what the said Master shall certify to be due in respect of such costs to the party entitled thereto, or in default thereof the same may be recovered in the same way as any other costs payable under an order of the said Court, or the same may be recovered by distress in the manner hereinbefore provided in other cases of costs."

Now, it is contended on the one part that that clause only applies to taxation before payment, and for two reasons. In the first place, that the clause itself goes on to provide for the payment by the promoters of the amount of the taxed costs, a direction which it is apparent can apply only in the case of the taxation of an unpaid bill of costs.

In the second place it is said that if the construction is to be put upon the clause which is urged by the Respondents, the power of taxation, notwithstanding payment, is an unlimited one, and that such an order can be obtained after any lapse of time, without shewing any overcharge or any special circumstance, as a matter of right on a summary petition, and therefore as an order of course. Such a course it is suggested is unreasonable.

These two arguments have in my mind very great weight, and it appears to me that I should be doing wrong if I were to hold that under the section which provides first for taxation and then for payment, it is open for the railway company at any time after payment to obtain a taxation as of course. Whether they have any remedy by any other step than the order of course is not for me now to determine.

Solicitors: *Somerville; W. R. Stevens.*

C. W. C.

In re BOUGHTON.
BOUGHTON *v.* BOUGHTON.

[1878 B. 53.]

FRY, J.
1883
March 10, 17.

Solicitor—Lien for Costs—Administration Action.

The solicitor for the parties to an administration action will not, on a change of solicitor, be allowed to assert his lien for costs on papers in his possession in such a way as to embarrass the proceedings in the action.

On the contrary, he must produce the papers when they are required for the carrying on of the proceedings.

Adjourned Summons.

This action was brought for the administration of the personal estate of *John Boughton*, who died intestate on the 14th of November, 1877. The Plaintiff was the infant son and heir-at-law and sole next of kin of the intestate (suing by a next friend); the Defendant was the widow of the intestate, and was his administratrix. In 1878 an administration judgment was pronounced. Mr. *C. H. Edwards*, a solicitor, was in December, 1879, appointed solicitor for both the Plaintiff and the Defendant in the action, and he acted as such until the 14th of October, 1882, when orders were made to change the solicitor for both Plaintiff and Defendant, and to appoint Mr. *A. H. Maule* in the place of Mr. *Edwards* as solicitor in the action for both Plaintiff and Defendant. *Edwards* claimed a considerable amount as due to him for costs, and to retain the papers which were in his possession until his costs should be paid. A summons was taken out on behalf of the Plaintiff and the Defendant asking that *Edwards* might be ordered to deliver up on oath to the applicants, or to *Maule* as their solicitor, the papers in the action and all other deeds, papers, and writings in his custody or power belonging to the applicants, or in anywise relating to the action, *Maule* undertaking to hold the same subject to the lien (if any) thereon of *Edwards* for what should be found due to him upon any taxation of costs in the action.

FRY, J.

1883

In re BOUGHTON. BOUGHTON *v.* BOUGHTON.

J. G. Wood, for the summons:—

The Court will not allow a solicitor to assert his lien in such a way as to embarrass the proceedings in an administration action: *Belaney* v. *Ffrench* (1). *Edwards* is only entitled to an undertaking by us or our solicitor to hold the papers subject to any lien which he may have for costs. Of course the Court will not part with any assets without providing for his costs.

Dunham, for *Edwards*:—

My lien will be useless if I am ordered to give up the papers subject to the lien. I want to compel payment of my costs by keeping the papers till I am paid. The principle of the decision in *Belaney* v. *Ffrench* was that a trustee, not having himself any lien as against his *cestui que trust*, could not give to his solicitor any higher right against the *cestui que trust* than he himself had. That a solicitor has the right of lien which is claimed is shewn by *In re Moss* (2); *Lord* v. *Wormleighton* (3).

J. G. Wood, in reply.

FRY, J., after stating the facts, continued:—

Mr. *Edwards* has candidly stated that it is his intention to embarrass, and, if possible, to stop the proceedings in the action until his costs have been paid. The question is whether he has any such right. It appears to me that the authorities shew that he has not. The case of *Belaney* v. *Ffrench* has been referred to. In that case *Bacon*, V.C., said (4), referring to *Lord* v. *Wormleighton*: "Lord *Eldon's* words were greatly misunderstood if they were understood to say that a solicitor might, by detaining papers, embarrass the proper and rational progress of an administration suit." And *James*, L.J., said: "A solicitor cannot embarrass a suit by keeping papers which belong to an estate which is being administered by the Court, and cannot use that means of obtaining payment. There is no foundation for such a claim to lien, and it cannot be allowed." It is urged that in the present case the fact of the solicitor having acted for all

(1) Law Rep. 8 Ch. 918.
(2) Ibid. 2 Eq. 345.
(3) Jac. 580.
(4) Law Rep. 8 Ch. 920.

the parties to the action makes a difference. But that is obviously not a just ground of distinction, for it is admitted that there are creditors of the intestate still unpaid. Their rights of action are suspended by the pendency of this action, and they have a right to have the proceedings in it continued. From what has been said at the Bar, and from the report made by the Chief Clerk to me, it appears that Mr. *Edwards* has in his possession some papers the absence of which will prevent the proceedings in this action from going on. The proper order will be that he do deliver to the solicitor of the applicants such of the papers in his possession as may from time to time be required for the carrying on of the proceedings in this action, the necessity for production to be determined, if the parties differ, by the Judge in Chambers. The papers when delivered are to be retained by the applicants' solicitor, without prejudice to any lien which Mr. *Edwards* may have upon them, and to be returned to him if the Judge in Chambers shall so direct.

Solicitors for applicants: *Field, Roscoe, & Co.*, agents for *A. H. Maule, Newnham.*

Solicitors for *Edwards: Deane, Chubb, & Co.*

W. L. C.

In re BYRON'S CHARITY.

Practice—Interim Investment—Charity—Settled Land Act, 1882 (45 & 46 *Vict.* c. 38), *ss.* 21, 32.

Lands belonging absolutely to a charity were taken by a public body, and the purchase-money paid into Court under the *Lands Clauses Act*:—

Held, that the purchase-money could be dealt with under the provisions of the 32nd section of the *Settled Land Act*, 1882, as "money liable to be laid out in the purchase of land to be made subject to a settlement."

THIS was a petition by the trustees of *Byron's Charity* asking for the interim investment of £1200 cash in Court to the credit of *Ex parte the Great Northern Railway Company*, in respect of land belonging to the charity, in debenture stock of the *London and North Western Railway Company* to the same credit, under the provisions of the *Settled Land Act*, 1882, s. 21.

FRY, J.
1883
In re BYRON'S CHARITY.

By the 32nd section of the *Settled Land Act*, 1882, money in Court under the *Lands Clauses Act* "liable to be laid out in the purchase of land to be made subject to a settlement" may be invested as capital money arising under the *Settled Land Act*.

Smart, for the Petitioners:—

[FRY, J.:—Can it be said that the purchase-money of land belonging to a charity absolutely is liable to be laid out in the purchase of land to be made subject to a settlement.]

The 32nd section of the *Settled Land Act* must be read in connection with the 69th section of the *Lands Clauses Act*, which, providing for the application of "purchase-money or compensation coming to parties having limited interests or prevented from treating," enacts that the money shall be applied in the discharge of incumbrances "affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts, or purposes," so that this money is "settled" within the meaning of the *Lands Clauses Act*, and therefore is within the provisions of the 32nd section of the *Settled Land Act*.

Dunning, for the charity trustees.

FRY, J.:—

I think the 32nd section of the *Settled Land Act* must be read with the 69th section of the *Lands Clauses Act*, and therefore I make the order.

Solicitors: *Field, Roscoe, & Co.*; *Nelson, Barr, & Nelson.*

C. W. C.

HAWES *v.* DRAEGER.

KAY, J.

1883

March 5, 12, 17.

[1880 H. 4134.]

Bequest to Children of C. equally—Non-access of Husband and Wife—Illegitimacy—Evidence—Presumption of Legitimacy rebutted.

Testator bequeathed Government annuities upon trust for his daughter *C.* for life, and after her decease for her children equally. *C.* married *H. G.*, and by him had two children at the time when *H. G.* deserted her and his family. *C.* went to live with a man named *J. H.*, and while living with him had five children, the eldest of whom was *M.*, who was, according to the evidence, born during the lifetime of *H. G.* *M.* claimed a share of the fund in Court:—

Held, that, considering all the circumstances from which non-access between the husband and wife might be inferred, the presumption of the legitimacy of *M.* was rebutted, and that she was not entitled to any share of the fund.

GEORGE DRAEGER, who died in December, 1826, by his will, made in March of that year, bequeathed to three trustees, their executors and administrators, the sum of £6000 New 4 per Cent. Annuities upon trust to pay the dividends to his wife during her life, and after her decease to stand possessed of one-third part thereof, together with a further sum of £2000 New 4 per Cent. Annuities upon trust to pay the dividends to his daughter *Caroline* during her life for her separate use, and after her decease upon trust for the child or children or other issue of his daughter in such manner as she should appoint, and in default of appointment upon trust to pay the two sums mentioned "unto, between, and amongst all and every the children of my said daughter, if more than one, equally to be divided between them, share and share alike as tenants in common, and if there shall be but one such child, then to such one or only child, and to his, her, or their executors, administrators, and assigns, to and for his, her, and their own proper use and benefit, and to be a vested interest in such child or children respectively as they shall attain their respective ages of twenty-one years, and to be assigned, transferred, and paid to him, her, or them accordingly if my said daughter shall then have departed this life, but in case my said

KAY, J.
1883
HAWES
v.
DRAEGER.

daughter shall be then living at the time or times when any such child or children shall attain his or their respective ages of twenty-one years, then the assignment, transfer, or payment of the share of such of them as shall so attain the said age shall be postponed or deferred until after the decease of my said daughter, and in case any such child or children shall depart this life under the age of twenty-one years, then my will is that as well the original share or shares as the share or shares surviving or accruing to such child or children who shall so happen to die under the age of twenty-one years shall go and be assigned, transferred, and paid and disposed of to or for the benefit of my said grandchildren in such and the same manner as if such child or children so dying under the age of twenty-one years had never existed."

The widow of the testator died many years ago. The daughter *Caroline*, in March, 1826, intermarried with *Henry Gibbon*, and by him had two children, so far as could be ascertained, viz., *Caroline Mary* and *Augusta Jane*, both of whom died in their mother's lifetime, the latter in 1838, under the age of twenty-one years. *Caroline Mary* attained the age of twenty-one years, and intermarried with *John Hawes*, by whom she had two children, viz., *George* and *Emily*. There was no settlement on the marriage. *George* died under the age of twenty-one years, and in his mother's lifetime. *Caroline Mary* survived her husband and died a widow and intestate, in December, 1861, leaving her daughter *Emily* surviving, and she died under the age of twenty-one years in May, 1874.

Caroline Gibbon died in April, 1878, without having exercised the power of appointment. She survived her husband *Henry Gibbon*. *Emily Hawes's* next of kin at her death were her grandfather, *Richard Hawes*, who died in 1877, and her grandmother, *Caroline Gibbon*. The Plaintiff, a son of *Richard Hawes*, had obtained grants of letters of administration of both *Richard* and *Emily's* estates. The Defendant was a son and executor of the surviving trustee of the testator's will. The two sums mentioned were now represented by the sum of £4000 New Three per Cent. Annuities, and standing in the names of the three original trustees. The Plaintiff claimed to have the trusts of the will so far as they related to this fund carried into execution under the

direction of the Court. In the course of the inquiries which had been made in Chambers a claim was made by *Maria Haywood* to a share of the fund.

The question raised in Court was as to her legitimacy.

The facts and evidence are fully stated in the judgment.

Everitt, Q.C., and *B. Eyre*, for the Plaintiff, having stated the facts, referred to the cases of *Murray* v. *Milner* (1); *Banbury Peerage Case* (2); *Crouch* v. *Hooper* (3); and *Phillips* on Evidence (4).

Hastings, Q.C., and *E. Ford*, for the Defendant, referred to *Cope* v. *Cope* (5).

Fischer, Q.C., and *C. T. Mitchell*, for the claimant, commented upon the evidence produced by her, which they submitted was entitled to credit; and that there was no evidence to shew there had been no access between *Henry* and *Caroline Gibbon*; therefore the presumption of legitimacy had not been rebutted.

[They referred to the cases of *Plowes* v. *Bossey* (6); *Piers* v. *Piers* (7); *De Thoren* v. *Attorney-General* (8); *Wilson* v. *Hammonds* (9); *Rex* v. *Inhabitants of Sourton* (10); *Legge* v. *Edmonds* (11); *Reg.* v. *Inhabitants of Mansfield* (12); *Bury* v. *Phillpot* (13); and *Morris* v. *Davies* (14).]

Everitt, in reply, referred to *Morris* v. *Davies* (15).

Fischer, Q.C., mentioned the case of *In re Barony of Saye and Sele* (16).

Cur. adv. vult.

KAY, J.:—

A question of legitimacy is raised in this case under very peculiar circumstances.

(1) 12 Ch. D. 845.
(2) 1 S. & S. 153.
(3) 16 Beav. 182.
(4) Vol. i. p. 174.
(5) 1 Mood. & Rob. 269; 5 C. & P. 604.
(6) 2 Dr. & Sm. 145.
(7) 2 H. L. C. 331.
(8) 1 App. Cas. 686.
(9) Law Rep. 8 Eq. 323.
(10) 5 Ad. & E. 180.
(11) 25 L. J. (Ch.) 125.
(12) 1 Q. B. 444.
(13) 2 My. & K. 349.
(14) 5 Cl. & F. 163.
(15) Ibid. 248, 249–251, 254.
(16) 1 H. L. C. 507.

KAY, J.
1883
HAWES
v.
DRAEGER.

The testator in the action gave £6000 stock upon trust for his wife for life, and after her death one-third of it, with a further sum of £2000, for his daughter *Caroline Draeger* for her life, and after her death for her children as she should appoint by deed or will, and in default of appointment for her children equally, to be vested at twenty-one. *Caroline Draeger* married a man called *Henry Gibbon*. By him she had two children, *Caroline Mary* and *Augusta Jane*. The latter died in the year 1838 an infant. The power of appointment has not been exercised. *Caroline*, the mother, is dead. Her daughter *Caroline Mary*, who attained twenty-one, is dead, and the Plaintiff claims as legal personal representative the whole fund. The claim is disputed by *Maria Haywood*, who is also a daughter of *Caroline Gibbon*, but the question is whether *Maria* is legitimate. It appears that in 1831 or 1832 *Henry Gibbon* was in difficulties. A distress was put into his house, which, it was said, was somewhere in or near *Camden Town*, and he and his wife and family were turned into the street homeless, and he then deserted his wife and family. *Caroline Gibbon* then went to live with one *John Haywood* as his wife, and she had five children after that time, of whom *Maria Haywood* is one. *Henry Gibbon* lived until the 20th of August, 1837. He died somewhere near *Regent's Park*, and was buried in the churchyard of *St. John's Wood Chapel*, *St. Marylebone*. There is some evidence that in consequence of his wife having become intimate with *John Haywood*, *Gibbon* married, or professed to marry, another woman, whose Christian name was *Margaret*, and who was seen with him during his last illness. Except what I have stated there is no evidence where *Henry Gibbon* lived after his wife left him. As to her, it appears that she lived with *Haywood* for some years at *Brompton*, and from the circumstance that her daughter *Augusta Jane Gibbon* was baptized at *Brompton* on the 6th of March, 1831, it is probable, as is inferred by one of the witnesses, that at the date of such baptism her mother *Caroline Gibbon* was already living with *John Haywood*. *Augusta Jane* was killed by an accident on the 13th of June, 1838, having been run over in the street. She was buried at *Brompton* on the 19th day of that month by the name of *Jane Haywood*. This is the name which also occurs in the register of her death, which states the cause of death to be "accidental by a horse and cart," and the informant

is stated to be the coroner. *John Haywood* is, in some of the evidence, described as a corporal-major of the Life Guards, but in the registers of the births and deaths of his children he is described as a yeoman of the guard or yeoman in Her Majesty's household; the first of such registers being dated the 15th of July, 1838.

The first question is whether *Maria Haywood* was born during the lifetime of *Henry Gibbon*. There is no register of her birth or baptism. *Maria Haywood* has made four affidavits in this case, three of which were sworn and filed before it was suggested that she had any claim herself to share in the fund. By the first of these affidavits, sworn on the 12th of May, 1881, she stated, "I am now in the forty-second year of my age." According to that she was born in the year 1840, which would be some two or three years after the death of *Henry Gibbon*, and if this be true she could not be his child.

From the dates of birth of the other children it is quite possible *Maria* might have been born in 1840. But in her third affidavit, sworn in November, 1882, she states that her mother repeatedly informed her that the next children born to her after *Augusta Jane* were twins, viz., the deponent and *John Haywood* the younger, and that during the time that her mother was ill with her confinement on the birth of *George Draeger Haywood*, the deponent and *Augusta Jane* were returning home together from an errand on which they had been sent when *Augusta Jane* was knocked down by a horse and cart and killed, but the deponent was saved by reason of having let go her sister's hand. The birth of *George Draeger Haywood* is proved to have been some time previous to the 15th of July, 1838, by his baptismal certificate, which shews him to have been baptized on that day. *John Haywood* the younger is stated upon the tombstone of his reputed father's family grave to have died on the 4th of February, 1845, aged ten years and ten months. If, therefore, *Maria* was his twin sister she must have been born in 1834, in the lifetime of *Henry Gibbon*. The good faith of this affidavit of *Maria Haywood* seems clear from the fact that she states in it that it was generally understood in the family, or believed, that her mother had two children only by *Henry Gibbon*, and five by *John Haywood*, which five would

KAY, J.
1883
HAWES
v.
DRAEGER.

include herself. *George Draeger Haywood* was born before the 15th of July, it is stated in June, 1838, and if *Maria* was born before him she must have been born in the lifetime of *Henry Gibbon*, who died on the 20th of August, 1837. This evidence is also corroborated by an affidavit of Mrs. *Bayley*, who states that she knew *Caroline* the mother about the year 1836, when she was living with *John Haywood*, and *Maria* was living with them and was a little girl, but she did not know her age, and she states that there was also a little boy, whose age she did not know. I think I must infer from this evidence, though it is by no means clear, that *Maria Haywood* was born during the lifetime of *Henry Gibbon*.

Then I have to consider the question whether *Maria Haywood* is proved to be illegitimate. Having been born during the lifetime of the husband of *Caroline Gibbon* that fact is *primâ facie* evidence that she was legitimate.

It has been argued that such presumption can only be rebutted by positive evidence of non-access of the husband to the wife during such time as might make him the father of the child. But it must be remembered that the husband and wife are not allowed to give evidence on the question of non-access, and therefore it is impossible to prove that there was no access. All that can be done is to shew circumstances from which non-access may be inferred. In the *Banbury Peerage Case* (1), the law, as recognized by the House of Lords in *Morris* v. *Davies* (2), is thus stated:— That when husband and wife have opportunities of access the presumption of legitimacy may be rebutted by circumstances inducing a contrary presumption, and that non-access or non-generating access may be proved by means of such legal evidence as is admissible in every other case in which a legal fact has to be proved. The question to be decided in this case is whether the evidence is sufficient to rebut the presumption. In the case of *Reg.* v. *Inhabitants of Mansfield* (3), the facts were that a woman was deserted by her husband, who then lived with another woman. Some years afterwards she went through the ceremony of marriage with another man, and subsequently had two children; and some

(1) 1 S. & S. 153. (2) 5 Cl. & F. 163, 251.
(3) 1 Q. B. 444, 450.

years after that she again cohabited with her husband for a short time, who again deserted her. The Court of Queen's Bench determined that the non-access of the husband might be proved by circumstances, "one of which" it was said "certainly is an adulterous intercourse between the husband or wife and another party. But here the whole proof consists only of that single fact. We are not told what the husband was doing or where residing at the time when the two children in question were begotten." And another of the learned Judges said that during any part of the time he might have been living next door to the wife. In that case the woman was a pauper, and the parties were apparently in a low class of life, circumstances which must be taken into consideration in determining whether the presumption is rebutted. In the present case *Henry Gibbon* was a druggist, and his wife was entitled on the death of her mother, which occurred in 1847, to the income of the property I have mentioned, which she and her husband seem to have incumbered, but subject to such incumbrances, she received the income after 1847. It is stated that *Henry Gibbon* was a drunken and dissipated man, but that *John Haywood* was a respectable man, residing very comfortably at *Brompton*. The reputation in the family that *Maria* and *John Haywood* the younger and all the children subsequently born were the children of *Haywood* was so strong that it never seems to have occurred to *Maria* or any member of the family to doubt this until she had put in her third affidavit, when it was suggested, as I understand in Chambers, that she might possibly be entitled to claim. This reputation is assumed or spoken of in all the affidavits, and especially in that of *Jane Draeger*, also one of the family. *Maria* and all the subsequent children of her mother were called from the date of their respective births by the name of *Haywood*. Assuming that *Maria* and *John* the younger were twins, they were born about April or May, 1834. The next child was *George Draeger Haywood*, who was born in June, 1838. Then came *Sophia*, born in 1841, and lastly, *Mary*, born in 1845. All these, except *Maria*, no register of whose birth or baptism is produced, are described in the registers of their births, or deaths, or baptisms, as the children of *John Haywood*. *John* the younger, her alleged twin brother, is so described in the certificate of his

KAY, J.
1883
HAWES
v.
DRAEGER.

death, "son of *John Haywood*, yeoman of the guard." On the tombstone after *Jane* and *George*, who are both described as children of *John* and *Caroline Haywood*, the inscription as to *John* the younger is "also *John Haywood*," with the date of his death and his age. In the case of *Goodright* v. *Saul* (1) Mr. Justice *Ashurst* in directing a new trial of an ejectment, after consultation with the rest of the Court, said that he was convinced that too much stress had been laid (in the summing-up in that case as I understand his words) on the necessity of proving non-access, and he stated that it was a very forcible circumstance to rebut the presumption of legitimacy, that the husband having left the wife the child in question had taken a different name from his birth —the name of the person with whom his mother was living at the time—which had been retained by him and his descendants ever since; that, he said, was a very strong family recognition of his illegitimacy. In *Morris* v. *Davies* (2) the mother was living in adultery when the child was born, its birth was concealed from the husband, it was baptized as a base-born child, and was recognised by the wife's paramour as his child, and these facts were held sufficient to rebut the presumption. In the judgment of the Lord Chancellor (3) *Goodright* v. *Saul* was referred to with approval, and again in the judgment of Lord *Lyndhurst* (4). In the present case there is not any evidence, as there was in *Bury* v. *Phillpot* (5), of the husband and wife having been together or in the neighbourhood of one another after their separation in 1831. The fact of a woman of the class in life of *Caroline Gibbon* after her desertion living with a respectable man like *John Haywood*, and that *Maria* and all children afterwards born were called by his name, added to the strong reputation in the family of their illegitimacy, are sufficient in my opinion, added to the other circumstances I have mentioned, to rebut the presumption that *Maria Haywood* was legitimate.

Solicitors: *Fielder & Sumner; Heales & Son.*

(1) 4 T. R. 356.
(2) 5 Cl. & F. 163.
(3) 5 Cl. & F. 255.
(4) Ibid. 262.
(5) 2 M. & K. 349.

T. F. M.

In re NEWTON'S TRUSTS.

CHITTY, J.

1882

Dec. 9, 11.

Married Woman—Reversionary Interest—Mortgage Debt—Acknowledged Deed—Fines and Recoveries Act (3 & 4 *Will.* 4, *c.* 74), *ss.* 1, 77 [*Revised Ed. Statutes, vol. vii. pp.* 487, 511].

Under the will of a testator who died in 1843, his three children, *T.*, *W.* and *S.*, a married woman, were each entitled to one-third of his residuary estate, subject to the life interest therein of his widow.

In 1844 *T.* died a bachelor and intestate.

By a deed executed in 1854 (before *Sir R. Malins' Act*), to which the tenant for life, the trustees of the will, *W.*, and *S.* and her husband, were parties, and which was acknowledged by *S.* under the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74), two mortgage debts, secured to the trustees on real estate and forming part of the testator's residuary estate, were assigned by the tenant for life and *W.* and by *S.* and her husband, with the privity of the trustees, by way of mortgage.

The deed was executed under the erroneous assumption that, according to the terms of a gift over in the will, *T.* took no share in the testator's estate, and consequently his administrator was not made a party.

Held, that the deed was not effectual to pass *S.'s* share of the two mortgage debts.

Williams v. *Cooke* (1) distinguished.

CHRISTOPHER NEWTON, by his will, dated the 24th of November, 1843, after making a specific bequest, devised and bequeathed his real estate and residuary personal estate to *John Newton* and *Jonathan Pool*, upon trust for his wife, *Jane Newton*, for her life, and after her decease to sell the real estate and stand possessed of the proceeds and his residuary personal estate, upon trust to divide the same equally amongst all his children living at his death. And the testator declared that if any of his said children should die before receiving his, her, or their share, without having disposed of the same, leaving issue, such issue should take his or her parent's share, and that if any of his said children should die without leaving issue and without having disposed of his, her, or their share, the share of him, her, or them so dying should go equally to the survivors and the issue of such as might be dead. And the testator appointed the said *John Newton* and *Jonathan Pool* his executors.

(1) 4 Giff. 343.

CHITTY, J.
1882
In re NEWTON'S TRUSTS.

The testator died on the 7th of December, 1843, leaving surviving him his widow, *Jane Newton*, and three children, *Thomas Newton*, *William Newton*, and *Sarah Todd*, the wife of *George Todd*.

Thomas Newton died in 1844, a bachelor and intestate. He had no legal personal representative.

By an indenture dated the 23rd of October, 1854 (before *Sir R. Malins' Act*, 20 & 21 Vict. c. 57), and made between the said *Jane Newton* of the first part, the said *William Newton*, *George Todd*, and *Sarah Todd* of the second part, the trustees of a creditors' deed executed by one *Thomas Eastham* of the third part, the said *Thomas Eastham* of the fourth part, the said *John Newton* and *Jonathan Pool* of the fifth part, and *Francis Pearson* of the sixth part (which indenture was acknowledged by the said *Sarah Todd* under the *Fines and Recoveries Act*), after reciting that by certain indentures of mortgage and further charge the one-third share or other the part or share of her the said *Sarah Todd*, or of the said *George Todd* in her right, in the proceeds of sale of the testator's real estate and in his residuary personal estate, and also the life interest of the said *Jane Newton* under the said will, had been assigned to the said *Thomas Eastham* by way of mortgage for securing the sum of £250 and interest; and also reciting two indentures of mortgage and further charge, whereby two sums of £440 and £60, which had been advanced by the said *John Newton* and *Jonathan Pool* out of the testator's residuary personal estate, were secured on certain freehold hereditaments: It was witnessed that in consideration of the payment of the said mortgage debt of £250 by the said *Francis Pearson* to *Eastham's* trustees, such mortgage debt and interest and the securities for the same were assigned and transferred to the said *Francis Pearson* subject to the proviso for redemption thereinafter contained. And it was further witnessed "that for the consideration aforesaid they the said *Jane Newton*, *William Newton*, and *George Todd* and *Sarah Todd*, with the privity of the said *John Newton* and *Jonathan Pool*, thereby granted, assigned, and transferred to the said *Francis Pearson* all those the said mortgage debts of £440 and £60, and all other the residuary personal estate of the said *Christopher Newton*

deceased," to hold to the said *Francis Pearson*, his executors, administrators, and assigns, subject to the proviso for redemption thereinafter contained. And it was further witnessed that for the consideration aforesaid the said *Jane Newton*, *William Newton*, and *George Todd* and *Sarah Todd*, according to their respective estates or interests therein, and with the privity of the said *John Newton* and *Jonathan Pool*, thereby granted and released two freehold cottages, being real estate of the said testator, to the use of the said *Francis Pearson* in fee subject to the proviso for redemption thereinafter contained. And the said indenture contained a proviso for redemption of the said several mortgaged premises, on payment by the several parties thereto of the first and second parts, or any of them, to the said *Francis Pearson* of the sum of £250 and any further advances not exceeding in the whole, together with the said sum of £250, the sum of £300, with interest at 5 per cent. per annum.

Shortly after the execution of that indenture a further advance of £50 was made by the said *Francis Pearson* to the said *George Todd*.

Sarah Todd survived her husband, *George Todd* (who died in 1858), and died on the 29th of April, 1864, intestate, and leaving no legal personal representative.

William Newton died in 1864, intestate, and leaving no legal personal representative.

The Respondent, *Thomas Newton*, was his sole surviving child.

Jane Newton, the tenant for life, died on the 29th of March, 1879. Since her death the testator's real estate, consisting of the above-mentioned two cottages, had been sold, and the mortgage debts of £440 and £60 got in by the trustees of the will, the net residue of the testator's estate consisting of the sum of £550 11*s.* 5*d.* This sum the trustees paid into Court under the *Trustee Relief Act* (10 & 11 Vict. c. 96).

The total mortgage debt of £300, together with a large arrear of interest, being still due on the mortgage of 1854, this petition was presented by the legal personal representative of *Francis Pearson*, who was dead, for payment of the debt out of the fund in Court.

The main question for argument was whether the mortgage

CHITTY, J.
1882
In re NEWTON'S TRUSTS.

deed of 1854, it having been acknowledged by *Sarah Todd* under the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74), was effectual to pass her then reversionary interest in her share of the mortgage debts of £440 and £60, as being an estate or interest in land within the meaning of the 77th section. For the purpose of arguing this question, his Lordship appointed the Respondent, *Thomas Newton*, to represent the legal personal representatives of *Thomas Newton* deceased, *William Newton*, and *Sarah Todd*.

Badcock, for the Petitioner:—

The deed of 1854 was no doubt executed on the erroneous assumption that in consequence of *Thomas Newton's* death intestate and without issue in the lifetime of the tenant for life, his one-third of the testator's residuary estate passed, according to the true construction of the will, to his surviving brother and sister, *William Newton* and *Sarah Todd*. That this was a wrong construction, and that *Thomas* took a vested interest in his one-third, is evident from *Holmes* v. *Godson* (1), which decided that a gift over, if the legatee does not dispose of his interest and dies intestate, is void. Consequently the share of *Thomas* devolved upon his mother, brother, and sister in equal shares as his next-of-kin, and his administrator should properly have been made a party. However, I submit that the fact of the deed having been executed under this misconception and without the concurrence of *Thomas's* administrator, does not cut down the effect of the assignment by *Sarah Todd* of her share and interest in the testator's estate.

The question is, what is the effect of her assignment by this acknowledged deed? That question only arises as regards the mortgage debts of £440 and £60, for *Sarah Todd's* interest in the proceeds of the real estate clearly passed by the deed: *Briggs* v. *Chamberlain* (2). I submit that her reversionary interest in the mortgage debts, which she assigned in specie, was not an interest in personalty but in land, and therefore such an interest as she could dispose of by an acknowledged deed under sect. 77 of the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74). That section enables a married woman, by deed acknowledged, to dispose of

(1) 8 D. M. & G. 152. (2) 11 Hare, 69.

"any estate which she alone, or she and her husband in her right, may have in any lands:" and the interpretation clause (sect. 1) defines "estate" as including "any interest, charge, lien, or incumbrance in, upon, or affecting lands, either at law or in equity."

The case is covered by *Williams* v. *Cooke* (1), where it was held that a married woman could, by deed acknowledged under the *Fines and Recoveries Act*, dispose of her reversionary interest in a debt secured on land by deposit of deeds. Vice-Chancellor *Stuart* said (2), "Where a debt is secured by deposit of title-deeds, the real estate being the subject of an equitable mortgage, the owner of the debt has an interest in the real estate." *A fortiori* where, as in the present case, the mortgage is legal and not equitable only.

[CHITTY, J.:—Here the married woman was not "the owner of the debt." It belonged to the trustees.]

A mortgage debt is certainly an "interest in land" within the *Mortmain Acts*: *Coote* on Mortgages (3). The fact of these mortgage debts having been got in and paid into Court does not alter their character as an interest in land.

[CHITTY, J., referred to *In re Durrant and Stoner* (4)].

A. T. Watson, for the Respondents, *Thomas Newton* and the trustees of the will:—

I do not contend that the deed was not sufficient to pass *Sarah Todd's* interest in the proceeds of sale of the realty, but I submit that it was ineffectual as regards her interest in the mortgage debts. The deed assigns the mortgage debts as personal estate simply: consequently there is no disposition of any estate or interest in land within the meaning of the 77th section. Here the married woman had, not an incumbrance, but only an interest in an incumbrance on land. A mere interest in an incumbrance on land is not an interest in land. *Williams* v. *Cooke* is distinguishable, because there the husband and wife could, together, dispose of the mortgage debt, whereas in the present case there

(1) 4 Giff. 343.
(2) Ibid. 346.
(3) 4th Ed. p. 339.
(4) 18 Ch. D. 106.

CHITTY, J. 1882 *In re* NEWTON'S TRUSTS.

were other persons entitled, one of whom, the administrator of *Thomas*, was not a party to the deed; and the debt belonged to the trustees, not to the wife. Moreover, in that case there was a distinct conveyance of the wife's interest in the real estate on which the debt was secured: here there is no grant or conveyance of the securities for the debt.

Badcock, in reply:—

The 77th section includes any estate the married woman "may have" in any land; and, I submit, extends to the interest she possesses in the land charged in the event of future default in payment of the mortgage debt.

CHITTY, J.:—

The point may be stated shortly in this way. Under a will *Jane Newton* was tenant for life, and *William Newton* and *Sarah Todd*, a married woman, were entitled to two-thirds in remainder, of personal property comprised in the will. *Thomas Newton*, who was also entitled to one-third, was dead at the date of the deed I shall presently mention, but no administrator of his estate was appointed. *William Newton* and *Sarah Todd* seem to have considered that, according to the true construction of the will, they were entitled to *Thomas's* share as his sole next of kin. If that was the view on which they acted, it was wrong, for *Thomas's* share had not become divested by his death, and therefore his administrator was the person entitled to it, his personal estate devolving on his next of kin, *William Newton* and *Sarah Todd*, his brother and sister, and also *Jane Newton*, his mother. Under these circumstances a deed was executed in 1854, to which the trustees of the will were parties, and the deed was expressed to be with their privity; that is, the assignment and transfer were made with their privity: but they were made parties to the deed for no other purpose than to give them full notice of what it proposed to do. It appeared that money forming part of the testator's estate and consisting of two sums of £440 and £60 had been invested on mortgage of freehold land. Under these circumstances, by the deed in question, *Jane Newton*, the tenant for life, and *William Newton*, *George Todd*, and *Sarah Todd*, with the

privity of the trustees, assigned the mortgage debts of £440 and £60, and all other the residuary personal estate of the testator, to one *Pearson* by way of mortgage. This deed was acknowledged by *Sarah Todd;* and the question is whether her one-third share of the two mortgage debts passed by the deed: and whether her share which she took as one of the next of kin of *Thomas Newton* in his one-third also passed.

The question turns upon the construction of the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74), taken in connection with the facts I have mentioned. It appears to me that the deed is not sufficient to pass either the original one-third of *Sarah Todd* or the share which she took under the intestacy of her brother *Thomas.*

The 77th section of the *Fines and Recoveries Act* enables a married woman by deed acknowledged "to dispose of lands of any tenure . . . . and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure."

Then, turning to the interpretation clause (sect. 1), we find that the word "estate" includes any interest, charge, lien, or incumbrance in, upon, or affecting lands, either at law or in equity; and the word "lands" has a wide interpretation in another part of the section.

The decision in *Williams* v. *Cooke* (1) which, if I may say so, seems perfectly right, established that a married woman who, with her husband, is entitled to a mortgage debt, has a charge or incumbrance within the meaning of the 77th section taken in connection with the interpretation clause; but in the present case the point is different. Here, the married woman, together with other beneficiaries, had an interest in the mortgage debt, so that she and her husband together could not have disposed of it, and moreover there was another party interested, namely, the administrator of *Thomas Newton,* who was not a party to the deed.

Then it is said that the present case falls within the 77th section of the *Fines and Recoveries Act,* because it includes any estate which the married woman "may have" in land, and at the date of the deed *Sarah Todd,* as being entitled to a share in the

(1) 4 Giff. 343.

CHITTY, J. 1882 *In re* NEWTON'S TRUSTS.

mortgage debts, "might have," on default in payment of the mortgage debts, an estate or interest in the land on which they were secured; but that is not the true construction of the section. The section refers to the actual state of things at the time the deed is executed by the married woman.

It appears to me that the case is not within the 77th section, because one of the persons interested in the mortgage debts was not a party to the deed. For these reasons I am of opinion that the deed of 1854 failed to operate as an effectual mortgage of the original share of *Sarah Todd*, or of the share which she took as one of the next of kin of *Thomas Newton* in these two mortgage debts. Consequently the Petitioner is not entitled to receive any part of the fund in Court that represents *Sarah Todd's* original and derivative share.

Solicitors: *Crowder, Anstie, & Vizard; Shum, Crossman, & Co.*

G. I. F. C.

CHITTY, J. 1882 Dec. 14.

WARWICKER *v.* BRETNALL.

[1882 W. 2760.]

Settled Estate—Fire Insurance—Tenant in Tail—Payment of Premiums out of Rents—Policy Moneys, who entitled to.

During the infancy of a tenant in tail of freehold estates devised in strict settlement, part of which consisted of a corn-mill let on lease, the rents were received by his mother on his behalf, and she thereout paid the premiums necessary for keeping up a policy which had been effected in her name for insuring the mill against fire. The will contained no provision for fire insurance.

The mill having been burnt down, and it not being considered for the benefit of any person interested in the settled estates that it should be rebuilt:—

Held, that the insurance moneys belonged to the infant tenant in tail as his personal estate, and were not to be treated as real estate for the benefit of all persons interested in the settled estates.

DEMURRER.

The statement of claim alleged as follows:—

Robert Bretnall, by his will dated in 1856, devised all and every his messuages, mill, lands and hereditaments, and the machinery

and going gear in and about the said mill, to his wife for her life; and after her decease, he devised his messuage and mill, with the land thereto belonging, situate in *Witham*, in the county of *Essex*, and the going gear in and about the said mill, to the use of his grandson *Robert Bretnall* for his life, without impeachment of waste, with remainder to the use of his first and other sons in tail, with remainder to the use of his daughters as tenants in common in tail; and, in case of there being but one daughter, then to the use of such daughter in tail; with remainder to the use of the testator's granddaughter, the Plaintiff, *Mary Warwicker* (then *Mary Bretnall*), for her life, without impeachment of waste, with remainder to her first and other sons in tail, with remainders over. And the testator empowered the trustees or trustee for the time being of his will, during minorities, to lease any part of the messuages, mill, lands, and hereditaments thereby devised for any term not exceeding twenty-one years, at the best yearly rent, and so that the lessee should not be made dispunishable for waste.

The will contained no provision or obligation as to the repair or insurance of buildings on the settled estates.

The testator died in 1859, leaving his widow, *Sarah Bretnall*, his grandson, *Robert Bretnall*, and his granddaughter, the Plaintiff, him surviving.

The testator died seised of (amongst other properties) a messuage situate at *Chipping Hill*, in *Witham* aforesaid, and a water corn mill adjoining, called the *Chipping Hill Mill*, and certain lands held therewith.

The testator's widow, *Sarah Bretnall*, died in 1875, and *Robert Bretnall*, the grandson, in 1878. Upon the death of the latter his only child, a daughter, the infant Defendant *Lizzie Bretnall*, became entitled as tenant in tail in possession to the said messuage, mill, and premises, the Plaintiff being entitled to the next estate in remainder.

Robert Bretnall, the grandson, during the time he was tenant for life of the said messuage, mill, and premises, took out in his own name a fire insurance policy on the messuage, mill, and machinery in the *Essex Equitable Insurance Company*, at an annual premium of £10 2*s.* 1*d.* Shortly after his death the

CHITTY, J. 1882 WARWICKER v. BRETNALL.

Defendant *Barbara Bretnall*, the mother of the infant Defendant, caused the policy to be altered into her (the mother's) name.

By an indenture of lease dated the 1st of October, 1878, the Defendant *John Cook*, the then surviving trustee of the will, demised under the power contained in the will the messuage, mill and machinery, and adjoining lands, to *Arthur Smith* for a term of fourteen years, at a rent of £80. The lease contained covenants by the lessee to pay the rent, to keep the premises in repair, and to surrender the premises at the expiration of the term in good and tenantable repair, "damage by fire only excepted."

Upon the lease was indorsed a memorandum dated the 17th of January, 1879, and signed by the lessor, by which it was agreed that in case the demised premises should be burnt or damaged by fire during the term the lessor would, within six months, rebuild and reinstate the premises, or that, in default, the lessee should be entitled to deduct from his accruing rent a sum by way of damages to be fixed by arbitration.

At the date of the memorandum and thenceforth the said messuage, mill, and premises stood insured in the name of the Defendant *Barbara Bretnall*.

The Defendant *Barbara Bretnall*, by the permission of the trustee of the will, received the rent under the lease on behalf and for the maintenance of her daughter the infant Defendant, and she thereout paid all the expenses of effecting the policy in her name and the premiums for keeping it on foot.

On the 22nd of February, 1882, the mill was totally destroyed and the adjoining messuage was greatly damaged by fire, whereupon the insurance company paid to the Defendant *Barbara Bretnall*, under the policy, a sum of £487 (about which no question arose) for the value of the machinery, and a sum of £928 18*s.* in respect of the buildings.

The cost of rebuilding the mill was estimated to greatly exceed the amount received from the insurance company, and it was not considered to be for the benefit of anyone interested in the settled estates that the mill should be replaced.

Out of the £928 18*s.* received by her, the Defendant *Barbara Bretnall* paid the lessee a sum of £175 in discharge of all claims

for reinstatement under the memorandum, and thereupon the lessee surrendered the lease to the lessor.

Estimates for repairing the messuage and converting it into a private residence had been obtained by the Defendant *Barbara Bretnall*, on behalf of the infant Defendant, and it was found that the necessary repairs and alterations could be executed for about £150, which sum the Defendant *Barbara Bretnall* was about to lay out accordingly, it being considered that the proposed alterations would be more advantageous to the parties interested in the settled property than rebuilding the mill.

After deducting the amount of compensation paid to the lessee and the cost of repairs, there remained out of the policy moneys a balance of £603 18*s*.

The question was, whether this balance ought to be treated as personal estate or real estate.

On behalf of the infant Defendant it was contended that the balance belonged absolutely to her, and that it was to her interest that it should be deemed her absolute personal estate and invested accordingly.

On the other hand, the Plaintiff contended that the insurance had been effected for the benefit of all parties interested in the settled estates under the will, and therefore that the balance in question ought to be received by the Defendant *John Cook*, as trustee of the will, as part of the settled estates, and impressed with or retaining the character of realty.

In order to have these questions decided, this action was instituted, the Plaintiff claiming a declaration that the moneys received from the insurance company were to be treated and ought to be held as realty, and as part of the settled estates, and for the benefit of the infant Defendant and of the Plaintiff, and of all other persons interested in the settled estates.

The infant Defendant *Lizzie Bretnall* (by the Defendant *Barbara Bretnall*, her mother and guardian *ad litem*), and her co-Defendants, her mother, and *John Cook*, the trustee, demurred to the statement of claim on the ground that the moneys belonged to the infant Defendant, and were to be deemed her personal estate, and that the Plaintiff had no estate or interest in such moneys, or any part thereof.

CHITTY, J.

1882

WARWICKER v. BRETNALL.

Warmington, for the demurrer:—

I submit that, in the absence of any obligation to insure, a policy of fire insurance enures for the benefit of the person out of whose moneys it has been effected and kept up, in this case the tenant in tail: *Rayner* v. *Preston* (1); *Bunyon* on Fire Insurance (2). Here there is not even an obligation to keep in repair, which might affect the insurance money, as in *In re Skingley* (3). *Seymour* v. *Vernon* (4) exactly covers this case. There a policy of fire insurance was effected by a tenant in tail under a will, and after his death and during the infancy of the next tenant in tail, the insurance was continued, and the premiums were paid first by the trustees of the will and then by the receiver in the action. Certain of the insured buildings having been burnt down, it was held that, inasmuch as the premiums had been paid out of the income of the infant tenant in tail, the insurance money belonged to him, and was not to be considered as part of the settled estate. I submit, therefore, that in the present case the £603 18*s.*, the balance of the insurance money, belongs to the infant Defendant, and that the demurrer ought to be allowed.

Fellows, for the Plaintiff:—

I submit that the money in question ought to be treated as forming part of the settled estate for the benefit not only of the infant Defendant, but of all the persons interested in the estate. *Seymour* v. *Vernon* is distinguishable, for there there was an obligation to insure. Moreover, the circumstances were peculiar; the authorities do not appear to have been brought to the attention of the Vice-Chancellor, and his decision was not apparently given with much confidence. In *Rook* v. *Warth* (5) the insurance money was held to belong to the remainderman in tail and not to the infant tenant in tail in possession. *Norris* v. *Harrison* (6) is an authority that the insurance must be treated as being for the benefit of all parties; and *Parry* v. *Ashley* (7) shews that the money is affected by a trust for the benefit of the persons entitled

(1) 14 Ch. D. 297.
(2) 2nd Ed. p. 181.
(3) 3 Mac. & G. 221; 15 Jur. 958.
(4) 16 Jur. 189.
(5) 1 Ves. Sen. 460.
(6) 2 Madd. 268.
(7) 3 Sim. 97.

to the premises insured. In *Davidson's* Precedents (1) it is said that "Though in the absence of special contract or obligation, the tenant for life"—and this applies equally to a tenant in tail—"is not bound to rebuild in case of fire, and by parity of reasoning is not bound to insure, yet it seems that if he insured he would be bound to lay out the insurance money in rebuilding."

[CHITTY, J.:—I find no authority for that statement.]

CHITTY, J.:—

This is a friendly action instituted for the purpose of ascertaining who is entitled to the surplus of the money arising from a policy of fire insurance. The money is claimed, on the one hand, by the Plaintiff on behalf of the settled estate, and, on the other hand, it is claimed on behalf of the infant—who is tenant in tail under the will—by his guardian as part of his personal estate.

The facts are as follows:—[His Lordship stated them, and continued:—] Now the policy having been in substance effected and kept up by or on behalf of a tenant in tail who was under no covenant to insure, I hold that as a matter of law the surplus money in question belongs to the infant Defendant as being the person out of whose moneys the policy had been effected and kept up.

No intention has been or can be imputed to the infant Defendant, or her guardian on her behalf, of making the policy moneys a present to the settled estate.

The point came before Vice-Chancellor *Kindersley* in 1852, in *Seymour* v. *Vernon* (2), where he held that the infant tenant in tail was, under the circumstances, entitled to the benefit of the insurance on the ground I have stated. That decision has now been standing for some time, and must, in my opinion, govern the decision in the present case. It is said, however, that the authorities upon the point were not cited to the Vice-Chancellor. I will therefore shortly go through them. The first case is that of *Rook* v. *Warth* (3), before Lord *Hardwicke*. There an entailed copyhold tenement was burnt down and the sum of £96 was collected "on briefs" towards the rebuilding; that is to say, a

(1) 3rd Ed. Vol. iii. pt. i. p. 290, n.
(2) 16 Jur. 189.
(3) 1 Ves. Sen. 460.

CHITTY, J. 1882 WARWICKER v. BRETNALL.

charitable donation was made for the purpose of repairing the property. The money was paid by the trustees of the charity to the guardian of the infant in tail, who died without its having been so applied. The question was whether the money was subscribed for the benefit of the infant or for the benefit of the estate. Looking at that case, I have no doubt it was given for a specific purpose, namely, the rebuilding of the property. The Lord Chancellor says (1), "This is a case of infancy, which operates in this manner: he was under guardianship; and his estate ought to be taken care of, and applied according to the nature of it; and the Court will always take care it shall be so, and will not suffer his real property to be changed into personal during his infancy, or his personal into real"—and so on, thus stating the well-known rule of law as to infants. Then he says that on a bill on behalf of the infant the Court would have compelled the guardian to lay out the money in rebuilding. But that doctrine has no application to the case before me, because there the money was given for the purpose of rebuilding, and did not come out of property or income belonging to the infant.

Norris v. *Harrison* (2) was decided simply upon the question as to what was the intention of the person originally entitled to the insurance money. He had in fact abandoned all claim to the money, and made it a gift to the remainderman.

In *Parry* v. *Ashley* (3) a person in a fiduciary relation—an executrix—renewed a policy of fire insurance on a freehold house which had been insured by the testator. It was held that she must be treated as having renewed it in her character of executrix. The house having been burnt down Sir *Lancelot Shadwell* said, "The inclination of my opinion is, that the proceeds of the policy cannot be considered as part of the testator's general personal estate, but that they are affected with a trust for the benefit of the parties interested in the real estate." It is unnecessary for me to say whether or not I agree with that authority, but it appears to me that that decision ought not to be placed in competition with that of Vice-Chancellor *Kindersley* upon the exact point now before me.

(1) 1 Ves. Sen. 461. (2) 2 Madd. 268.
(3) 3 Sim. 97, 100.

I accordingly hold that the balance in question belongs to the infant as his personal estate, and I therefore allow the demurrer.

Solicitors: *Vallance & Vallance*, agents for *W. B. Blood, Witham.*

G. I. F. C.

In re BASHAM.
HANNAY *v.* BASHAM.

[1877 B. 529.]

Practice—Administration Action—Defaulting Executor or Trustee—Breach of Trust—Bankruptcy—Costs—Bankruptcy Act, 1869, *s.* 49.

Where, after the commencement of an administration action against a defaulting executor or trustee, he becomes bankrupt, and, under sect. 49 of the *Bankruptcy Act*, 1869, his debt remains undischarged by the bankruptcy, he is not entitled to be paid any of his costs of the action, whether incurred before or after the bankruptcy, until he has made good his default.

But where the debt of the defaulting executor or trustee has been discharged by his bankruptcy—as where the bankruptcy has taken place prior to the *Bankruptcy Act*, 1869; or where, after the bankruptcy, his debt remaining undischarged, he renders services in the action in his character of executor or trustee, he is entitled to be paid his costs incurred subsequently to his bankruptcy, though his prior costs must be set off against his debt.

Lewis v. *Trask* (1) followed.

Clare v. *Clare* (2) not followed.

THIS action was instituted for the administration of the estate of a testator, *George Basham*, and for an account from the Defendant *Elizabeth Basham*, his sole surviving executrix.

By the judgment, dated the 24th of July, 1878, various accounts and inquiries were directed.

On the 19th of July, 1880, *Elizabeth Basham* was adjudicated a bankrupt and *John Lord* was appointed trustee in the bankruptcy, whereupon an order was made in the action directing the proceedings to be carried on against him as such trustee.

By his certificate, dated the 25th of October, 1882, the Chief Clerk found a balance of £2740 18*s.* 7*d.* to be due to the estate

(1) 21 Ch. D. 862. (2) 21 Ch. D. 865.

CHITTY, J.
1883
In re BASHAM.
HANNAY *v.* BASHAM.

from the Defendant *Elizabeth Basham* as executrix, and this balance—which represented assets lost or misappropriated by her at various times since the testator's death—still remained unpaid. Upon the action coming on upon further consideration, the question arose as to whether, under the circumstances, the Defendant *Elizabeth Basham* was entitled to her costs of the action. His Lordship refused to give her any costs incurred prior to her bankruptcy, but directed the case to stand over for further argument on the question whether she was entitled to her costs incurred subsequently to her bankruptcy. This question accordingly now came on for argument.

Romer, Q.C., and *Rowden*, for the Plaintiff, a residuary legatee:—

The decisions upon the point are somewhat conflicting, but we submit the balance of authority is in favour of not allowing a defaulting bankrupt executor any costs whatever until he has made good his default. The original rule in an administration suit was that a debtor to the estate who was entitled to have his costs of suit out of the fund would not be allowed to receive payment of them while his debt continued unsatisfied, but the costs due to him would be set off *pro tanto* against the debt due from him: *Harmer* v. *Harris* (1). But in the case of a bankrupt executor indebted to the estate this rule was modified, for while his costs incurred before his bankruptcy were ordered to be set off against his debt, his costs incurred in the proper performance of the duties of his trust after his bankruptcy were allowed out of the estate: *Samuel* v. *Jones* (2); *Gibbons* v. *Hawley* (3). The reason was that under the old bankruptcy law the debt was discharged by the bankruptcy, and that the executor who had conducted himself properly after the bankruptcy and had rendered assistance in the administration was entitled to his subsequent costs like any other executor. But, on the other hand, in *Carr* v. *Henderson* (4), Lord *Langdale*, M.R., held that a defaulting administrator and his assignees in bankruptcy appointed *pendente lite* were not entitled to any costs of suit. In the still later case of *Bensusan* v. *Nehemias* (5) no costs were given to a

(1) 1 Russ. 155.
(2) 2 Hare, 246.
(3) 2 Hare, 246, n.
(4) 11 Beav. 415.
(5) 4 De G. & Sm. 381.

defaulting bankrupt trustee. In *Bowyer* v. *Griffin* (1), which was a case under the *Bankruptcy Act*, 1861, Vice-Chancellor *Malins* held that a defaulting bankrupt trustee was entitled to his costs of suit, following a decision by Vice-Chancellor *Wood* in *Turner* v. *Mullineux* (2), where it was held that an executor was entitled to be paid his costs subsequent to his bankruptcy though the judgment contains no discussion of the point. In *Bowyer* v. *Griffin* the bankruptcy took place before the commencement of the action, and the reason for the decision appears to have been that the estate of the trustee was divested by the bankruptcy. Such was the state of the authorities prior to the *Bankruptcy Act*, 1869, which made an important alteration in the law as to the liability of a bankrupt for a breach of trust; for it is clear that, under sect. 49 of that Act, an order of discharge does not now release the bankrupt from any debt or liability incurred by a breach of trust.

In *Watson* v. *Row* (3), Vice-Chancellor *Hall* held that all the costs of suit incurred by a deceased insolvent executor who was indebted to the estate must be set off against his debt. On the other hand, in *Smith* v. *Dale* (4) the Master of the Rolls held that the costs of the defaulting bankrupt executor prior and subsequent to the bankruptcy must be distinguished, those prior to the bankruptcy being set off against the debt, and the subsequent costs being allowed in full. But in that case the circumstances were peculiar, there being two executors, and the bankrupt executor being in default in respect of a debt due to the testator at the time of his death. The question was really one of set-off, and does not negative the principle that a party who is indebted to the estate does not get his costs of suit until he has made good his default. That principle was recognised and adopted by Mr. Justice *North* in the recent case of *Lewis* v. *Trask* (5), though in *Clare* v. *Clare* (6), decided a few days afterwards, Vice-Chancellor *Hall* preferred to follow *Bowyer* v. *Griffin*, and held that a defaulting trustee or executor, who, though adjudicated bankrupt, was retained as a party to an action, was entitled to be paid his

(1) Law Rep. 9 Eq. 340.
(2) 9 W. R. 252.
(3) Law Rep. 18 Eq. 680.
(4) 18 Ch. D. 516.
(5) 21 Ch. D. 862.
(6) Ibid. 865.

CHITTY, J.
1883
In re BASHAM.
HANNAY v. BASHAM.

costs incurred subsequent to the bankruptcy. The Vice-Chancellor does not, however, refer to the principle, which in fact does not appear to have been fully placed before him, and we therefore submit that the decision in *Lewis* v. *Trask* (1) should be preferred. It seems most unreasonable that the residuary legatee should be called upon to pay his debt to the executor while the executor is not required to pay his debt to the residuary legatee.

Ince, Q.C., and *Simmonds*, for the executrix, *Elizabeth Basham*:—

The principle upon which the Court has proceeded in directing payment to a bankrupt executor or trustee of his costs incurred in an administration action subsequently to his bankruptcy is this, that he is kept before the Court entirely for the convenience and benefit of the plaintiff, and therefore, having no means of his own wherewith to defend himself, his costs should be provided for out of the estate. In *Samuel* v. *Jones* (2) Vice-Chancellor *Wigram* says: "A different rule would be very harsh. Suppose the case of an executor who has had the misfortune to be made a bankrupt, and who is a debtor to the estate of his testator in a small sum, whilst the chief part of the estate has been got in and secured by his diligence: is a party in such a situation not to have his costs as executor until after the whole of his debt at the time of his bankruptcy shall have been repaid?" It is now, we submit, the settled practice in administration actions where a trustee or executor becomes bankrupt in the course of the action, to direct payment of his costs incurred subsequently to his bankruptcy, notwithstanding he may be indebted to the estate; though his costs prior to the bankruptcy must be set off against his debt: *Morgan and Davey* on Costs (3): *Seton* on Decrees (4); *Lewin* on Trusts (5); *Cotton* v. *Clark* (6). The reason for making the distinction between the costs prior and subsequent to the bankruptcy is that up to the time of bankruptcy the executor or trustee has control over the estate, but from the moment of bankruptcy he is stripped of everything and he is kept before the Court entirely

(1) 21 Ch. D. 862.
(2) 2 Hare, 246, 248.
(3) 2nd Ed. pp. 190–1, 342–3.
(4) 4th Ed. pp. 482, 502.
(5) 6th Ed. p. 832.
(6) 16 Beav. 134.

for the advantage of the plaintiff, and certainly for no benefit to himself. He is left with nothing and is liable to pay nothing. Whatever he may ultimately be able to pay the plaintiff will get by proving in the bankruptcy. In *Samuel* v. *Jones* (1) two grounds are stated for giving him his costs; first, the harshness of disallowing them; and, secondly, his discharge from his debt by his bankruptcy. But under the present *Bankruptcy Act*, 1869, a defaulting executor or trustee is not discharged from his debt by his bankruptcy, so that if the Plaintiff's view is correct, the executrix must be kept before the Court until payment of her debt in full, though she has not a single shilling wherewith to defend herself. *Smith* v. *Dale* (2) and *Clare* v. *Clare* (3) are clear authorities in our favour, and ought, we submit, to govern the decision in the present case.

Grosvenor Woods, Levett, and *McSwinney,* for incumbrancers and other parties having liberty to attend.

CHITTY, J.:—

The question in this case is whether an executrix who has become bankrupt since the commencement of the action is entitled to her costs of the action incurred subsequently to the bankruptcy. In regard to the authorities I must say that they are conflicting. There are two direct decisions on the point, one by Vice-Chancellor *Hall* and the other by Mr. Justice *North*—which are certainly inconsistent with each other. In this state of things it is necessary that I should consider shortly what the principles are upon which the Court appears to have proceeded. In the case of *Smith* v. *Dale* (4) the Master of the Rolls, after reading a passage from Lord *Gifford's* judgment in *Harmer* v. *Harris* (5) ending with these words—"these parties cannot receive their costs while they continue debtors to the estate," said: "That was right." That is to say, the principle is that the defaulting executor is entitled to no costs until he has made good his default. It is equally clear that this principle applies to a trustee as well

(1) 2 Hare, 246.
(2) 18 Ch. D. 516.
(3) 21 Ch. D. 865.
(4) 18 Ch. D. 516, 519.
(5) 1 Russ. 155.

CHITTY, J.
1883
In re BASHAM.
HANNAY *v.* BASHAM.

as to an executor. No distinction can be made between the two cases; but another principle has been introduced, and in order to shew what that principle is, I must go through some of the leading authorities upon the subject.

The first case is that of *Samuel* v. *Jones* (1), and there Vice-Chancellor *Wigram* allowed the costs of a defaulting executor incurred subsequently to his bankruptcy. I will not read his judgment at length, but it seems to me that he states one ground, and one ground only, for his position, and that is, that the bankruptcy was a statutory mode by which the debt of the executor was discharged. Consequently there was no set-off as between the costs which the executor or trustee was *primâ facie* entitled to, and the debt which he owed to the estate. Why? Because the debt was barred by the bankruptcy. That appears to be the ground on which the case of *Gibbons* v. *Hawley* (2), which is cited in a note to *Samuel* v. *Jones*, was decided, because the decree, which appears to have been most carefully framed, recites that "inasmuch as the defendant became a debtor to the estate of the testator, and was discharged by virtue of the Acts in force for the relief of insolvent debtors in respect of the amount of her default," and then, for that reason and for other reasons given, orders payment to the defendant of her costs subsequent to her default. It is quite immaterial whether it was technically right to say that the defendant was discharged by the insolvency. It is sufficient for the purposes of that judgment to say that she was substantially discharged, for the only mode in which she could have been reached after the insolvency was through the medium of an order of the Insolvency Court permitting execution on the judgment entered up in pursuance of the warrant of attorney. That appears to put the matter on an intelligible ground. There was no longer any means of set-off as between the debt which the defaulting trustee or executor had owed to the estate and the right which he had to the sum which he was entitled to receive by way of costs out of the estate, because the debt itself was discharged.

It is unnecessary to go through other decisions which are to the same effect, but I will go at once to the case of *Bowyer* v. *Griffin* (3) before Vice-Chancellor *Malins*. That was preceded by

(1) 2 Hare, 246. (2) 2 Hare, 247, n. (3) Law Rep. 9 Eq. 340.

a case of *Turner* v. *Mullineux* (1) decided by Sir *William Page Wood*, which is very shortly reported, the grounds on which the decision proceeded not being stated; but Vice-Chancellor *Malins* in the case of *Bowyer* v. *Griffin* says this (2): "So far as the bill seeks to make him (the trustee) account for the trust fund, which he has misapplied, that being a mere money demand which ought to have been made, not against him personally, but against the trustees of the composition deed, he is improperly made a party; so far as it seeks to execute the trusts and to change the trustees he is a necessary party; but he is entitled to have his costs paid by those who have brought him and kept him before the Court. If the suit had been instituted before the bankruptcy his costs incurred before the bankruptcy would have been set off against his debt to the estate; but his costs incurred after his bankruptcy, by which he has divested himself of his estate, must be paid." It is said that, having regard to that passage, the ground on which the Vice-Chancellor proceeded was that the estate of the trustee was divested by the composition-deed or by the bankruptcy. I can hardly think, however, that this was the true ground on which the Vice-Chancellor proceeded. The case was one to which the old bankruptcy law applied; and there is some difficulty in maintaining, if the ground suggested for the Vice-Chancellor's decision was the true one, that any distinction can be made, in principle, between the costs prior to and those subsequent to the bankruptcy; for if the mere fact that the trustee no longer has any estate is sufficient to excuse him in the one case it seems to me it is sufficient to excuse him in the other—that is to say, to excuse him from the effect of his own default. It appears to me that the decision in *Bowyer* v. *Griffin* ought to be placed on the footing of the principle enunciated in *Samuel* v. *Jones* (3).

The exact point did not come before the present Master of the Rolls in *Smith* v. *Dale* (4). That was a case where there were two executors, and the default, if there was a default, was on the part of the executor who had become bankrupt, and was in respect of a debt which he himself owed to the testator's estate. It does not

(1) 9 W. R. 252.
(2) Law Rep. 9 Eq. 342.
(3) 2 Hare, 246.
(4) 18 Ch. D. 516.

CHITTY, J.
1883
In re BASHAM.
HANNAY *v.* BASHAM.

appear when the testator died; what time had elapsed, or whether there had been any unreasonable delay in getting in the debt. As the facts disclosed in the report shew, it was a debt which fell within the ordinary operation of the bankruptcy law, and therefore would be barred. If the debt had been one arising from a breach of duty committed as executor or trustee, it seems to me that the learned counsel who argued that case would not have failed to argue the point as to the non-discharge of the debt. I say that because this case was decided in 1881, and although it is now said at the Bar that the principle upon which I propose to proceed had not been thought of at that time, that is an error, because it had been clearly pointed out in Mr. *Lewin's* book on Trusts, in the edition which appeared in the year 1875. In the edition which appeared in 1879 the same point is taken, and it is there stated in this way (1): "The Court never gives costs to a defaulting trustee while he continues in default, but the Court says, 'when you have paid in the balance found due from you, then you shall have your costs.' But a bankrupt ceases from the date of the bankruptcy to be a debtor to the trust estate, and is therefore entitled to his costs from the date of the bankruptcy." That passage appears to me to state truly the principle under the old bankruptcy law; but then in a note Mr. *Lewin* refers to the present state of the bankruptcy law under the Act of 1869, suggesting that the practice with reference to the payment of an executor's costs is now altered by reason of the change in the bankruptcy law.

Perhaps I ought to say that I have looked at *Morgan and Davey* on Costs, and also *Seton* on Decrees, and they contain nothing which is material for me to mention in my judgment.

I now come to the two last decisions on the point.

The first is that of Mr. Justice *North* in the case of *Lewis* v. *Trask* (2), in which he declined to order payment to a defaulting executor of any costs out of the estate until he had made good his default. This is what he says: "With regard to the case of *Bowyer* v. *Griffin* (3) I shall only follow it to this extent, that the trustee may have his costs after he has paid into Court the sum in which he is in default. Otherwise I do not think that case

(1) 6th Ed. p. 832. (2) 21 Ch. D. 862, 864.
(3) Law Rep. 9 Eq. 340.

applies to the present, because there was no money due from the trustee to be paid into Court, whereas in the present case there is a sum due and an order for its payment into Court." He takes the same ground as that on which I have proceeded.

Then Vice-Chancellor *Hall* in a subsequent case of *Clare* v. *Clare* (1), decided a few days afterwards, appears to have made inquiries as to *Lewis* v. *Trask* (2), which had not then been reported, and he makes the following statement, which is worthy of observation, because it has been said that the practice was settled. The Vice-Chancellor said that the practice did not appear to him to be settled; and then he went on to say that he preferred to follow the decision in *Bowyer* v. *Griffin* (3), "as it seemed to him to be consistent with good sense to hold that any person who, though adjudicated bankrupt, was retained as a party to an action, as executor or trustee, should be paid his costs."

I do not see how it can be said that a bankrupt executor is retained by the beneficiaries merely because he is not dismissed from the suit; but I have very little doubt that it would be a right course to allow a defaulting executor, notwithstanding his bankruptcy being subsequent to the commencement of action, to have his costs paid out of the estate if the parties beneficially interested in that estate said, We cannot get on without your assistance; you must remain before the Court, and we wish you to appear by solicitors and counsel. If any case of that sort were made out, it appears to me that the executor would be entitled, seeing that he is the executor and that it is impossible for him to divest himself of the character of executor, to his subsequent costs on account of the services rendered by him to the Court, and that he would be entitled to be paid those costs out of the assets of the estate; but otherwise I think the right principle is that a defaulting executor or trustee cannot get any of his costs out of the estate until he has made good his default. Where, however, the debt arising from the default is one that has been barred by the bankruptcy, he is entitled to be paid his costs subsequent to the bankruptcy, and also in the other case I have just mentioned, although the debt is not barred.

(1) 21 Ch. D. 865, 867. (2) 21 Ch. D. 862.
(3) Law Rep. 9 Eq. 340.

CHITTY, J.
1883
In re BASHAM.
HANNAY *v.* BASHAM.

I therefore make an order similar to that in *Lewis* v. *Trask* (1), namely, that Mrs. *Basham* do pay into Court the balance found due from her within two months, and that her costs be paid out of the estate; but she is not to have them paid until she has paid in her balance.

Solicitors: *Park Nelson & Co.; W. Vant; G. R. Dodd; L. B. Mozley.*

G. I. F. C.

CHITTY, J.
1883
Feb. 19.

WALLIS *v.* JACKSON.

[1881 W. 1095.]

Practice—Motion on Admissions in the Pleadings—Indorsement on Writ—"Pleading"—Rules of Court, 1875, *Order* II. *r.* 1; *Order* XL. *r.* 11—*Judicature Act*, 1873, *s.* 100.

The indorsement on a writ is not a "pleading" so as to entitle a Plaintiff, without the consent of the Defendant, to move thereon for an order on admissions in the pleadings under Rules of Court, 1875, Order XL., r. 11, in a case where the Defendant, admitting the Plaintiff's claim, has given notice that he does not require the delivery of a statement of claim.

THIS was a mortgagee's action for foreclosure.

The Defendant appeared to the writ, and at the same time gave notice, pursuant to Rules of Court, 1875, Order XIX., rule 2, that, as he could not contest the Plaintiff's claim, he did not require the delivery of a statement of claim, whereupon the Plaintiff moved for and his Lordship pronounced, under Order XL., rule 11, the usual judgment or order for foreclosure.

The Registrar, however, refused to draw up the order on the ground that there were no "pleadings" within the meaning of Order XL., rule 11.

The matter was now mentioned to the Court.

Willis Bund, for the Plaintiff:—

I submit that the indorsement on a writ is a "pleading" upon which a plaintiff may move under Order XL., rule 11. The interpretation clause (sect. 100) of the *Judicature Act*, 1873, defines

(1) 21 Ch. D. 862.

the word "pleading" as including "the statements in writing of the claim or demand of any plaintiff." This would seem to include the indorsement on a writ; for according to Order II., rule 1, the indorsement is "a statement of the nature of the claim made." Upon principle it seems only just to a mortgagor who admits the mortgagee's claim that the mortgagee should be able to enforce his claim in the least expensive manner. In such a case as the present a statement of claim is a wholly unnecessary and useless expense to the Defendant, the mortgagor.

[*Crossley*, Q.C., and *Burton Buckley*, as *amici curiæ*, referred to the Annual Chancery Practice, 1882 (1) and *Wilmott* v. *Young* (2).]

CHITTY, J., refused the application, saying that it seemed clear from the authorities referred to that the indorsement on the writ was not a "pleading" on which the Plaintiff could move under Order XL., rule 11, without the consent of the Defendant. He regretted, however, that, under the circumstances, he was unable to make the order.

Solicitors: *Wright & Co.*, agents for *E. T. Ratcliff, Birmingham.*

G. I. F. C.

In re GODFREY'S TRUSTS.

Trustee—Copyholds—Dying without an Heir—Vesting Order—Petition by Person absolutely entitled—Trustee Act, 1850 (13 & 14 *Vict. c.* 60), *ss.* 15, 28 [*Revised Ed. Statutes, vol. x. pp.* 985, 989].

The sole trustee of copyholds held in trust for *A. B.* absolutely having died intestate and without an heir, *A. B.* presented a petition under the *Trustee Act*, 1850, asking that the property might be vested in himself:—

Held, that the Court had jurisdiction to make the order under the combined operation of ss. 15 and 28 of the Act.

PETITION.

In 1847 the Petitioner, *William Godfrey*, having purchased certain copyhold premises from the trustees of his father's will, the same were, by the direction of the Petitioner, conveyed by an indenture of bargain and sale to a trustee in trust for him

(1) Page 359. (2) 29 W. R. 413.

CHITTY, J. 1883 *In re* GODFREY'S TRUSTS.

absolutely, and thereupon the trustee was admitted to the premises as tenant on the Court rolls.

The trustee died in 1876 without leaving an heir and intestate as to trust estates.

The Petitioner had been in possession of the property ever since his father's death, and being desirous of effecting an enfranchisement applied for that purpose to the Ecclesiastical Commissioners as the lords of the manor, who required him first to obtain a vesting order. He accordingly presented this petition under the *Trustee Act*, 1850, asking for an order vesting the premises in himself.

A. St. John Clerke, for the Petitioner:—

There is a conflict of authority as to whether a person absolutely entitled to trust property can, under the *Trustee Act*, obtain an order vesting the property in himself. In *In re White* (1) such an order was made in Chancery and in Lunacy; but in *In re Holland* (2) the Lords Justices, sitting in Lunacy, refused to make the order in the case of a lunatic trustee on the ground that the Court, in acting under the *Trustee Acts*, never administered trusts.

I submit, however, that this case is distinguishable from *In re Holland*, as it is covered by sects. 15 and 28 of the *Trustee Act*. The former section provides that where a trustee of lands dies intestate without an heir the Court may "make an order vesting such lands in such person or persons in such manner and for such estate as the Court shall direct." Then sect. 28 states that the effect of a vesting order of copyholds is to vest the land without any surrender or admittance.

CHITTY, J.:—

You may take the order. I think I have jurisdiction to make it under the combined operation of sects. 15 and 28.

Solicitor: *E. H. Biggin.*

(1) Law Rep. 5 Ch. 698. (2) 16 Ch. D. 672.

G. I. F. C.

GREEN *v.* HUMPHREYS.

POLLOCK, B.

1883

Feb. 17; *April* 9.

[1882 G. 662.]

Statute of Limitations—Acknowledgment—Conditional.

A debtor wrote to his creditor, "I thank you for your very kind intentions to give up the rent of *Tyn-y-bwrwydd* next Christmas, but I am happy to say at that time both principal and interest will have been paid in full":—

Held, that this was an acknowledgment of the debt and was not conditional, and was sufficient to take the case out of the *Statute of Limitations*.

IN this case the only question as to which a report is necessary was whether the following letter written by a debtor to his creditor was an acknowledgment of the debt sufficient to take the case out of the *Statute of Limitations*:—"I thank you for your very kind intentions to give up the rent of *Tyn-y-bwrwydd* next Christmas, but I am happy to say at that time both principal and interest will have been paid in full." The facts are fully stated in the judgment.

Higgins, Q.C., and *G. Henderson*, for the Plaintiffs, the creditors, referred to *Chasemore* v. *Turner* (1), *Skeet* v. *Lindsay* (2), and *Smith* v. *Thorne* (3).

Crossley, Q.C., and *Northmore Lawrence*, for the Defendant, referred to *Philips* v. *Philips* (4); *Kennett* v. *Milbank* (5) [POLLOCK, B.:—That is not the law now]; and *Quincey* v. *Sharpe* (6).

April 9. POLLOCK, B.:—

In this case, which was heard before me on the 17th of February, 1883, the Plaintiffs, who are the executors of *John Humphreys*, deceased, claimed against the Defendant payment of £328 1*s.* 2*d.* At the trial it was proved to my satisfaction that

(1) Law Rep. 10 Q. B. 500
(2) 2 Ex. D. 314.
(3) 18 Q. B. 134.
(4) 3 Hare, 281.
(5) 8 Bing. 38.
(6) 1 Ex. D. 72.

POLLOCK, B. this amount was due in account from the Defendant to the Plaintiffs' testator. It also appeared, however, that the amount had been due for more than six years, and that no payment for principal or interest had been made to *John Humphreys* or to the Plaintiffs, or to any other person on their behalf, for upwards of six years before the commencement of the action.

1883

GREEN v. HUMPHREYS.

The Defendant having pleaded the *Statute of Limitations*, the only question between the parties was whether the debt was barred. In reply to this defence the Plaintiffs gave in evidence a letter dated the 18th of October, 1879, as to which the Defendant contended first, that there was no evidence to shew that it related to the debt in question; and secondly, that assuming that it did relate to the debt in question, it did not contain any acknowledgment sufficient to take the case out of the statute.

Upon the first point I was satisfied at the hearing upon the whole of the evidence that the letter related to the debt in question. With regard to the second point I took time to consider my judgment. The words of the letter in question relied upon by the Plaintiffs are as follows:—[His Lordship then read the letter.] The conclusion at which I arrive is, that the mention of "both principal and interest" with their context is a sufficient acknowledgment of the existence of a debt from which to imply a promise to pay: and if this is so the case is taken out of the statute, unless there be any expressions in the residue of the letter which shew that the promise is limited or made conditional upon the happening of some particular event. Now the words "will have been paid," so far from imposing any condition express or implied, almost amount to a promise to pay. They do not merely convey a hope, which has been thought to be insufficient, but denote rather an intention to pay with the power of doing so.

I was referred during the argument to several cases in support of the Plaintiffs' contention, but as each decided case turns so much upon the particular language used in the document relied upon to take the debt out of the statute, but little would be gained by noticing them. There is one, however, *Chasemore* v. *Turner* (1), decided by the Exchequer Chamber, of which I may

(1) Law Rep. 10 Q. B. 500.

say that it appears to me to do more than cover the present case. The words used there were these (1): "The old account between us, which has been standing over so long, has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid; perhaps, in the meantime, you will let your clerk send me an account of how it stands." Some of the Judges, both in the Queen's Bench and on appeal, thought that the expression "as soon as we can get our affairs arranged," implied a condition, but the majority in the Exchequer Chamber held the letter to be sufficient.

The way in which the authority was acted upon in *Quincey* v. *Sharpe* (2) is also strongly in favour of the Plaintiffs.

There will be judgment therefore for the Plaintiffs.

Solicitors for Plaintiffs: *Hunters, Gwatkin, & Haynes.*
Solicitors for Defendant: *Davidson & Morriss.*

(1) Law Rep. 10 Q. B. 501. (2) 1 Ex. D. 72.

C. M.

C. A.
1882
V.-C. B.
Dec. 21.
C. A.
1883
Jan. 24.

In re GOLD HILL MINES.

Winding-up—Petition to wind up by Creditor whose Debt is disputed—Evidence of Insolvency—Dismissal of Petition on Motion.

B., a dismissed servant of a company, claimed £15 for arrears of salary, and £95 damages for alleged wrongful dismissal. The company disputed both claims. *B.* filed a petition to wind up the company, alleging it to be insolvent, but there was no evidence of insolvency except the common statutory affidavit of the Petitioner. The company at once moved to stay proceedings on the petition, and in support of the motion filed an affidavit by their secretary shewing that the claims of the Petitioner were *bonâ fide* disputed, and that the company was solvent. *Bacon*, V.C., ordered that on payment by the company of £110 into Court all proceedings should be stayed until an action to be brought by the Petitioner had been tried. The company paid the £110 into Court and appealed :—

Held, by the Court of Appeal, that where a petition to wind up is improperly filed the Court has jurisdiction on motion to stay all proceedings under it, or to dismiss it; that the present petition was an abuse of the process of the Court, being brought to compel payment of a small debt which was *bonâ fide* disputed, and being unsupported by any evidence that the company was insolvent; that the petition therefore must be dismissed with costs, and the £110 returned to the company.

BULLOCK was employed by the company as mine agent at £300 a year, and on the 1st of July, 1882, received a three months' notice to determine his engagement. A few days afterwards he received a notice that he was to leave the employment of the company forthwith. This dismissal he alleged to be wrongful.

On the 5th of December, 1882, *Bullock* presented a petition to wind up the company, alleging that there was due to him £15 for arrears of salary, £75 for three months' salary in lieu of notice, and some other sums amounting to £20, which were in the nature of damages for wrongful dismissal. He alleged that the company was insolvent and unable to pay its debts, and that it was just and equitable that it should be wound up, and he prayed a winding up order. The only evidence of the insolvency of the company was the Petitioner's statutory affidavit in support of the petition and an affidavit by him that the manager in discharging him had said that he should have to discharge other servants of

the company, the company having no further funds to spend on the mines.

On the 6th of December the company gave notice of motion that *Bullock* might be restrained from advertising the petition, or taking any proceedings under it.

The Petitioner had never made any statutory demand on the company for payment of what he alleged to be due to him, nor had he furnished the company with particulars of his demand, though such particulars had been asked for by the secretary in a letter of the 22nd of September, 1882. The secretary deposed that the company was perfectly solvent, and ready and willing to pay anything that was justly due to the Petitioner, but that the company disputed there being anything due to him.

The motion was heard before Vice-Chancellor *Bacon* on the 21st of December, 1882.

Marten, Q.C., and *Grosvenor Woods*, in support of the motion to restrain the advertisement of the petition, submitted that the petition had been improperly presented, inasmuch as the Petitioner had never furnished the company with any particulars of the amount which he claimed otherwise than by the petition itself.

Beddall, for the Petitioner, submitted that the Court had no jurisdiction to restrain the issue of the advertisement, which by the *Companies Act* was expressly directed to be issued by the Petitioner. If, as they alleged, the company were perfectly solvent, let them pay into Court the amount claimed and the Petitioner thereupon would offer to dismiss his petition, and bring an action for the amount. Admitting as he did that he was not entitled to present a winding-up petition for the purpose of obtaining payment of a disputed debt when the company was perfectly solvent, there was no sufficient evidence that this company was solvent.

BACON, V.C.:—

The Act of Parliament has given a creditor who cannot get paid a right to present his petition against a company which not

C. A. 1883 *In re* Gold Hill Mines. V.-C. B.

only refuses to pay him, but is in a state of insolvency. That is all the Act does. It does not countenance applications to wind up as a means of enforcing the payment of debts which the company dispute. Considering the amount of mischief which would be done to the company, if solvent, by a petition to wind it up by a creditor whose claim only amounts to £110 and is disputed, I have not the least doubt that I have full jurisdiction to restrain the proceedings. I will not do so, however, unless I can be sure that I am doing no injustice to the Petitioner, and therefore upon the company bringing the £110 into Court, I will restrain the advertisement of the petition, and all proceedings under it, until an action to be brought by the Petitioner has been tried.

Beddall asked that a further sum to cover costs might be directed to be brought in.

Bacon, V.C., refused to increase the amount.

An order was made that the company should pay £110 into Court, to abide the result of an action which *Bullock* undertook to bring against the company to recover the amount claimed by him, and it was ordered that upon such payment all further proceedings should be stayed till after the trial of the action. The costs were reserved.

F. G. A. W.

The company paid the £110 into Court and appealed. The appeal was heard on the 24th of January, 1883.

Marten, Q.C., and *Grosvenor Woods*, for the company:—

The company say that the order of the Vice-Chancellor does not go far enough. The petition was improperly presented; no statutory demand having been made, the Petitioner having never given any particulars of his claim, and there being uncontradicted evidence that the company is solvent, the petition ought to have been dismissed with costs. The question what is proper to be done in such cases was much discussed before Vice-Chancellor *Hall*, in 1882, in the case of the *Quartz Hill Consolidated Gold Mining Company*, and his Lordship held that the Court had jurisdiction to stay proceedings under a petition to wind up. In that

case the Petitioner had a *primâ facie* right to present a petition, being the holder of a dishonoured bill of the company, and the proceedings were stayed only on money being brought into Court. This was affirmed by the Court of Appeal. Here we say there was no right to present a petition at all; he ought to have brought an action.

Beddall, for *Bullock*:—

There is a plain allegation of insolvency on the face of the petition, and the Petitioner's affidavit makes a *primâ facie* case in support of it.

[JESSEL, M.R.:—That has been contradicted on affidavit, and the affidavits on behalf of the company are not met.]

If the matter went on we could cross-examine the secretary, but the Vice-Chancellor refused to allow the matter to stand over for that purpose.

[JESSEL, M.R.:—And quite rightly. You ought to have been prepared with evidence of insolvency.]

The company gives no evidence as to the state of their assets, which they ought to have done when their solvency is disputed.

[JESSEL, M.R.:—They were not bound to enter into particulars to meet your mere general allegation of insolvency.]

The affidavit of the secretary contains inconsistent allegations as to the cause of the Petitioner's dismissal, which shews that the secretary's evidence cannot be relied on.

JESSEL, M.R.:—

I am of opinion that this petition can only be correctly described as a scandalous abuse of the process of the Court. The Petitioner is a discharged servant of the company. He alleges that there is due to him a sum of £15 for arrears of wages, which is disputed on the part of the company. That is the only alleged debt. He also claims a sum for damages for wrongful dismissal which is not a debt, and in respect of which he cannot present a winding-up petition. The damages for wrongful dismissal which he claims amount to £95. So that we have a petition presented by an

C. A. 1883 *In re* GOLD HILL MINES. Jessel, M.R.

alleged creditor for £15. He does not pretend that he has served the statutory notice. In fact, he could not serve it, for it is limited to creditors of £50 or upwards. He does not pretend that he does not know that both his debt and his claim for damages are disputed. Under those circumstances, he presents a petition to wind up the company, alleging, to prevent what one might call a demurrer to the petition, that the company is unable to pay its debts. There is not a particle of evidence in support of this allegation. He cannot allege a single circumstance to shew insolvency, but he relies on the general allegation of insolvency contained in his own affidavit in support of the petition. He is met by an affidavit of the secretary who deposes that the company is quite solvent. There is no evidence to rebut this, and then the Petitioner, through his counsel, tries to discredit the secretary, because there are in his affidavit some allegations as to the belief of the secretary with reference to the cause of the dismissal of the Petitioner which the Petitioner is pleased to term inconsistent with each other, but of which the inconsistency is certainly not manifest to my mind. It is out of the question that we should on such grounds treat the secretary as being unworthy of belief. It appears to me there is not a shadow of pretence for keeping this petition on the file, and that it ought to have been dismissed with costs and with not less emphasis than I am using now. That is the order we propose to make, and the Petitioner must pay the costs of the appeal and the costs of the motion in the Court below. The money deposited by the company will be returned.

LINDLEY, L.J.:—

I am of opinion that the order which the Master of the Rolls has just pronounced is the right one. The petition is presented by a person who alleges that he is a creditor of the company, and in support of the petition there is the ordinary statutory affidavit, the object of prescribing which is to prevent the abuse of putting upon the file long affidavits in support of the petition which may turn out to be unnecessary. The statutory affidavit strictly is no proof of anything. It is hearsay as to almost everything alleged in it, but it is sufficient to require an answer. The company at

once applied, not in terms to take the petition off the file or to dismiss it, but that the Petitioner might be restrained from advertising the petition or taking any proceedings under it; and their application is supported by the affidavit of the secretary that the company is perfectly solvent. The Vice-Chancellor considered that there was a case to try, and that the debt of the Petitioner was not only disputed but *bonâ fide* disputed, and the course he has taken is this—he has directed the company to pay into Court a sum of £110, and has directed an action to be brought, and restrained the advertising of the petition and all proceedings under it until the action has been tried.

From that order the company appeal, and the substantial question we have to deal with is whether this petition should be allowed to remain on the file or not. Now it ought to be understood that winding-up proceedings are not to be had recourse to for the purpose of recovering a disputed debt, especially when, as here, the company appears to be solvent. There is no evidence of insolvency but the statutory affidavit. It is met by an affidavit which displaces it, and leads me to believe that the company is perfectly solvent. In fact we have no evidence of insolvency. The Petitioner's debt is disputed both as to the liquidated amount—the £15—and as to the unliquidated claim. It appears to me that the Petitioner's right course was to bring an action and not to present a petition, and I agree in thinking that the process of the Court has been abused and that the petition ought to be got rid of as summarily as possible.

BOWEN, L.J.:—

I am of the same opinion. I think that this petition is an abuse of the process of the Court, and that it ought to be stayed or dismissed, and I believe the Court has power to do either with a petition of this kind.

I have nothing to add to what has been said by the Master of the Rolls and Lord Justice *Lindley*, except that I wish in the most emphatic manner to express my entire concurrence in the remarks that have been made as to the argument that has been addressed to us as to the credibility of the secretary's evidence. I know nothing about the secretary, but I say that on the mate-

C. A. 1883 *In re* Gold Hill Mines.

rials presented to this Court there is not a shadow of a foundation for the suggestion that he is unworthy of credit.

Solicitors for Petitioner: *Beall & Co.*
Solicitors for company: *Snell, Son, & Greenip.*

H. C. J.

C. A. 1883 *Feb.* 7.

In re LEE, a Person of Unsound Mind.

Lunatic Trader—Adjudication in Bankruptcy.

Leave given to the committee of the estate of a lunatic trader to consent to an adjudication in bankruptcy against the lunatic.

WILLIAM PHILIP LEE, a bootmaker, was found lunatic by inquisition, and on the 8th of August, 1879, *Jonathan Lee* was appointed committee of his estate. The committee continued the lunatic's business. The business turned out unsuccessful, several creditors recovered judgment against the committee for debts incurred in carrying on the business, and others had brought actions. One creditor took proceedings in the County Court at *Leeds* with a view to making the lunatic a bankrupt, but the Registrar refused to proceed on the petition. The committee now applied to the Court in Lunacy for directions.

Vernon R. Smith, for the application, referred to *Ex parte Cahen* (1).

The Court (*Jessel,* M.R., and *Lindley* and *Bowen,* L.JJ.) directed that the committee should be at liberty to consent to an adjudication in bankruptcy against the lunatic.

Solicitors: *Bell, Brodrick, & Gray.*

(1) 10 Ch. D. 183.

H. C. J.

In re ASTON.

C. A.
1883
Feb. 10.

Practice—Trustee Act, 1850, s. 32—*Reappointment of existing Trustees in the place of existing Trustees and a Lunatic Trustee.*

Where one of several trustees is of unsound mind, the Court will not reappoint the other trustees as trustees in the place of themselves and the lunatic trustee, for the purpose of excluding the lunatic trustee from the trust; but a new trustee must be appointed in his place.

In re Harford's Trusts (1) not followed.

J. G. STEVENSON, by his will, dated the 29th of July, 1879, devised his real estates to four trustees upon certain trusts. One of the trustees was of unsound mind, though not so found by inquisition.

It was now desired to remove the lunatic trustee from the trust and vest the real estate in the three other trustees. A petition was therefore presented under the *Trustee Act*, 1850, in Lunacy and in Chancery, asking that the three other trustees might be appointed trustees in the place of themselves and the lunatic trustee, and for a vesting order accordingly.

Maclean, for the Petitioners, referred to *In re Harford's Trusts* (1), in which a similar order had been made by the Master of the Rolls, and *In re Colyer* (Court of Appeal, June 19th, 1880), in which Lord Justice *Cotton* had declined to follow the same course. The practice of the Court was therefore not settled.

He also referred to the *Conveyancing Act*, 1881 (44 & 45 Vict. c. 41), s. 31.

JESSEL, M.R.:—

I adhere to the opinion which I expressed in *In re Harford's Trusts*, but as other Judges have an objection to make such an order, we must decline to make it; otherwise there would be a difference in the practice of the Judges of this Court. With respect to the 31st section of the *Conveyancing Act*, I do not think

(1) 13 Ch. D. 135.

C. A. 1883 *In re* ASTON.

that it was intended to vary the practice of the Court under the *Trustee Act*.

The Petitioners must amend their petition by asking for the appointment of a new trustee in the place of the lunatic trustee, and for the usual vesting order.

LINDLEY and BOWEN, LJJ., concurred.

Solicitors: *Winter & Co.*

M. W.

C. A. 1881 FRY, J. *Nov.* 12. C. A. 1883 *Feb.* 12.

BLIGHT *v.* HARTNOLL.

[1879 B. 54.]

Will—Gift of Residue except certain Property—Void Bequest of excepted Property—Excepted Property held to pass by Residuary Gift.

A testatrix gave to *C. H.* all her personal property except a certain wharf which she bequeathed to other persons charged with certain debts and annuities. The bequest of the wharf failed for remoteness:—

Held (affirming the decision of *Fry*, J.), that the wharf fell into the residue, and belonged to *C. H.*

Wainman v. *Field* (1) distinguished.

ELIZABETH BLIGHT, widow, by her will, dated the 12th of September, 1854, bequeathed all her personal property to her sister *Christiana Hartnoll*, with the exception of a certain debt owing to her, and of a leasehold wharf near *Woolwich*, and she devised to her sister *Christiana* during her life an annuity of £50 charged on, issuing, and payable out of the rental of the wharf. And after giving directions as to the payment of the said annuity of £50 after the death of her said sister, and of another annuity of £30, also charged upon the wharf, the testatrix directed that after payment of the said annuities the surplus income should be accumulated for the purpose of paying off two mortgages which were subsisting on the wharf. Then she directed her executors, after payment of the said annuities and mortgages, to sell the wharf and divide the proceeds among such of her grandchildren as might be then surviving, and in such proportions as her said sister *Christiana Hartnoll* might by will appoint.

(1) Kay, 507.

The testatrix had in November, 1852, settled the wharf upon such trusts as she should by deed or will appoint, and, in default of appointment, upon trust for her three children.

Elizabeth Blight died in 1854.

Christiana Hartnoll died in 1877, having by her will, made in 1876, purported to exercise the power given her by the will of Mrs. *Blight*, by appointing substantial shares in the proceeds of the sale of the wharf to *Robert H. Hartnoll*, *Hartnoll Hartnoll*, and *William Blight*, and nominal ones to three other grandchildren of Mrs. *Blight*. And she gave the residue of her estate to *Robert H. Hartnoll* and *Hartnoll Hartnoll*.

A suit having been instituted for the administration of the trusts of Mrs. *Blight's* will, several question were brought before the Court for its decision, and among others the question was raised as to the validity of the power of appointment given in her will to *Christiana Hartnoll*.

On the 12th of November, 1881, Mr. Justice *Fry* decided that the appointment of the wharf, or of the proceeds of the sale thereof, purported to be made by Mrs. *Blight's* will after the payment of the annuities and mortgages, was void for remoteness (1).

On the same day the question was argued whether Mrs. *Blight's* interest in the wharf passed by her will under the bequest of the residue to *Christiana Hartnoll*, or went as undisposed of to Mrs. *Blight's* next of kin.

Cookson, Q.C., and *Grosvenor Woods*, for the Plaintiffs, who were the next of kin, referred to *In re Pinède's Settlement* (2); *In re Ickeringill's Estate* (3); *In re Davies' Trusts* (4); *Wainman* v. *Field* (5); *Davers* v. *Dewes* (6).

T. J. Edwards, for a Defendant in the same interest.

J. Pearson, Q.C., *Methold*, and *Oswald*, for the residuary legatees under *Christiana Hartnoll's* will, were not called on.

Mitchell, for the surviving executor of *Christiana Hartnoll's* will.

(1) 19 Ch. D. 294.
(2) 12 Ch. D. 667.
(3) 17 Ch. D. 151.
(4) Law Rep. 13 Eq. 163.
(5) Kay, 507.
(6) 3 P. Wms. 40.

C. A. 1883 BLIGHT v. HARTNOLL.

FRY, J.:—

In my view the testatrix has made this wharf part of her personal property. I think in the first place the general scheme of the will indicates the testatrix's intention to deal with this wharf as her own, and to deal with every interest in it. She not only makes the charges upon it and makes the provision for payment of mortgage debts out of it, but she directs the sale of it by her executors, and she directs the distribution of the entire proceeds resulting from the wharf. In addition to that, she more than once describes this wharf as her wharf. Again, in the words of exception which she uses she excepts it from her personal property, which is equivalent to a declaration that the wharf was part of her personal property.

The next question which arises is this, whether having treated it as part of her personal property she has by words of exception so far taken it out of the residuary estate as that the lapsed legacies, and the portion of this wharf go to her next of kin instead of to the residuary legatees. In my judgment she has not done so. I take the rule to be plain that in general the residuary gift carries every lapsed legacy and every legacy which on any ground fails to take effect, but that is subject to this other rule, that if the testator has shewn some intention with regard to the excepted property inconsistent with its ever falling again into the residue, effect must be given to that intention.

Of that latter principle *Wainman* v. *Field* (1) is an illustration. In *Wainman* v. *Field* the testator in effect said, "all my debts are to be paid out of my residue and not out of the excepted property." It follows from that that so far as his intention could prevail the excepted property never could fall into the residue, because if it did it would have frustrated the intention that the debts should not have been paid out of it. Here I have heard the ingenious and able argument of Mr. *Grosvenor Woods*, to shew that a similar intention is expressed, but I can find nothing of the sort. I can find an intention that the testatrix's excepted property should bear certain unpaid portions of debts in a particular manner and in a particular order; but I can find no expression of intention that the excepted property shall in no

(1) Kay, 507.

events pay the debts. On the contrary, with regard to any lapsed interest in this property the will is in my opinion entirely silent, and as it excepts this property from the residue for the purposes only of the bequest, there is no difficulty whatever as to the lapsed bequest falling into the residue. I think the general rule applies, and that the residuary legatee takes the whole property under the bequest which fails.

From this decision the Plaintiffs appealed. The appeal was heard on the 12th of February, 1883.

Cookson, Q.C., and *Grosvenor Woods*, for the Appellants:—

The testatrix has made the wharf part of her personal property, but has expressly excepted it from her residuary gift. It is a question of construction, not of law; the whole scope of the will shews that the testatrix did not mean the property to go to the residuary legatees: *Wainman* v. *Field* (1); *Davers* v. *Dewes* (2); *Jarman* on Wills (3).

Everitt, Q.C., *Methold*, and *Oswald*, for the residuary legatees, were not called on.

Mitchell, for the surviving executor of *Christiana Hartnoll's* will.

T. J. Edwards, for another Defendant.

JESSEL, M.R.:—

It is well to see what the law is upon this subject before we attempt to construe this will. I take it that the law as to residuary personalty is now substantially the same as the law relating to real estate, with respect to which the statute 1 Vict. c. 26, s. 25, enacts that unless a contrary intention shall appear by the will such real estate or interest as is comprised in any devise which shall fail or be void by reason of the death of the devisee in the lifetime of the testator or by reason of the devise being contrary to law shall be included in the residuary bequest. If that be so,

(1) Kay, 507. (2) 3 P. Wms. 40.
(3) 4th Ed. p. 762.

C. A. 1883 BLIGHT v. HARTNOLL. Jessel, M.R.

the first question is whether the bequest in this case is a residuary bequest, for if it is the void gift must *primâ facie* fall into it. You may have a residuary bequest in various forms; the same thing may be meant though not expressed in the same words. But however it is expressed, the effect must be that it is intended to comprise all which is not disposed of by the will. It is not a true residue if there is some part not disposed of by the will to anybody at all. There is a difference between a part of the estate being undisposed of and a part being unduly disposed of. When I say a residue I mean the residue of the estate not professed to be otherwise disposed of by the will. If any part is not professed to be disposed of at all by the will there is no true residuary gift. The wording is not material. If a man says, "I give all my personal estate except my gold watch, which I give to *A.*, and my leasehold house, which I give to *B.*," that is a true residuary gift. The common form no doubt is to begin with a bequest of legacies to *A.*, *B.* and *C.*, and then to give the residue to *D.* But it means the same thing. *Evans* v. *Jones* (1) is an authority for that, if one is wanted. But it is very different if a testator gives everything to *A.* except his gold watch and his leasehold estate and does not give them to anybody else. In that case there is not a lapse or void gift of the watch and leasehold estates, they are not legacies at all, but they go to the next of kin, and there is no true residuary gift. But the moment we get a true residue the law is that the residue is increased by the lapse of a legacy or by the fact that it has not been effectually given away in accordance with the expression of the testator's intention.

Here the residuary gift is as simple as possible. The testatrix gives to *Christiana Hartnoll* all her personal property except a certain wharf, and that wharf is expressed, to be given away to other persons, but is not validly given away, some of the limitations being void for remoteness. Why should not this wharf fall into the residue? It is said that there is a contrary intention shewn, because the will makes the wharf subject to certain debts which are charged on it. But it is only made subject to the debts if the legacy takes effect: there is nothing charged on it

(1) 2 Coll. 516.

if the legacy does not take effect. It appears to me very difficult to suppose that a testator should intend that a legacy which fails from being void should not go into the residue. Unless you find express words shewing that the testator doubted whether a bequest in his will was void or not, it is impossible to suppose that he contemplated what would happen if the bequest was invalid. It is different from the case of lapse, for every testator knows that there is a possibility of a legatee dying before him, although of course he presumes that the legatee will survive him. The only case which I can conceive of is where a testator doubts whether charities to which he wishes to make bequests are capable of taking them; in that case he may put into his will a string of illegal bequests, but we cannot assume that he knew them to be illegal. It is almost impossible to imply a direction that if a legacy should fail, as for example for remoteness, it should not fall into the residue. There is nothing in the present case to lead one to suppose that the testatrix thought the gift would be void, or intended that if it was it should not fall into the residue. Therefore in my opinion the decision of Mr. Justice *Fry* was correct.

As regards *Wainman* v. *Field* (1), as I have before observed, the Vice-Chancellor came to the conclusion that there was no true residue, and therefore the property in question did not fall into the residue. That decision is merely one of construction, and I do not think that I should have come to the same conclusion on the construction of the will in that case, but that is not material. There is no principle laid down, and I cannot extract any principle from the decision. Therefore whether I concurred in the construction or not that authority has no application to this case.

LINDLEY, L.J.:—

I also think that the judgment of Mr. Justice *Fry* is correct. The first question we have to consider is what is the true meaning of the expression, "I give to *Christiana Hartnoll* all my personal property with the exception of my wharf at *Lower Charlton*." Is that the gift of a residue? Is there any difference between that

(1) Kay, 507.

C. A. 1883 ~~ BLIGHT v. HARTNOLL. Lindley, L.J.

gift and a residuary gift in the common form? I see no difference. Starting with that we come to the second question. Is there any expression of intention to exclude from the residue that which would naturally fall into it. Our choice is between testacy and intestacy, and the testatrix can hardly be deemed to have intended to die intestate as to any part of her property. The intention must be got from the will, and I cannot find anything in the will that shews such an intention.

I have looked at both the authorities cited by Mr. *Cookson*. In *Davers* v. *Dewes* (1) I do not find that the Court laid down any different principle. The *ratio decidendi* will be found at p. 42 of the report. There the Lord Chancellor says, "It was plain the testator did not intend that the furniture should pass by the will, but reserved them to be disposed of by a subsequent codicil; and if it were admitted that the Lord *Dover* did not intend to dispose of them by the will his lady as residuary legatee could not thereby be entitled to them;" that is, the Court came to the conclusion that the testator intended to keep them out of the residue and to dispose of them by a codicil. In the other case, *Wainman* v. *Field* (2), the Vice-Chancellor came to the conclusion on the particular words of the will that the testator did not intend that the property should fall into the residue. If we had arrived at the conclusion on the construction of this will that the testatrix intended to exclude the wharf from the residue, that authority would have been applicable: but we have arrived at no such conclusion.

BOWEN, L.J.:—

I am of the same opinion.

Solicitors: *Owles; Sismey; Shaft.*

(1) 3 P. Wms. 40. (2) Kay, 507.

M. W.

PERUVIAN GUANO COMPANY *v.* BOCKWOLDT.

C. A.
1882
V.-C. B.
Dec. 8.
C. A.
1883
Feb. 14, 16.

[1880 P. 0367.]

Practice—Stay of Proceedings—Suits between same Parties in English and Foreign Courts—Election.

An action was brought in this Court by an English company against a firm of French merchants for the delivery of the cargoes of certain ships, or in the alternative for damages, and for an injunction and receiver.

At the commencement of the action the ships were in British waters, but they had since been removed by the direction of the Defendants to ports in *France*, and the cargoes had been taken possession of by the Defendants. Proceedings had been instituted by the Plaintiffs in a French Court for recovery of the cargoes. The English action comprised a claim for the cargo of one ship which was not claimed in the French action.

A motion, on behalf of the Defendants, that the Plaintiffs might be ordered to elect whether they would proceed with the English action or with the French proceedings was refused.

THIS was a motion on behalf of the Defendants that the Plaintiffs might be ordered within seven days to elect whether they would proceed with the action, or with proceedings which they had instituted in a Court in *France* in relation to the same subject-matter.

The action was brought on the 6th of May, 1880, for the delivery to the Plaintiffs, who were an English company, of the cargoes of seven vessels, or in the alternative for payment of £100,000 damages; and for an injunction and a receiver.

The Defendants were the masters of the ships (who were afterwards dismissed from the action), and Messrs. *Dreyfus Brothers & Co.*, who were resident in *France*, and carrying on a large business as merchants in that country.

At the commencement of the action the ships were in British waters, but they had since been removed by order of the Defendants, and taken to ports in *France*, where the cargoes had been taken possession of by the Defendants. The Plaintiffs had instituted proceedings in the Tribunal of Commerce of the Department of the *Seine* in respect of the cargoes of six of the vessels.

C. A. 1883 — PERUVIAN GUANO COMPANY v. BOCKWOLDT.

The present motion referred only to the cargoes of the six ships which were included in the concurrent French action.

The motion was heard before Vice-Chancellor *Bacon* on the 8th of December, 1882.

Ingle Joyce, for the motion:—

Authority for this motion will be found in a case of *Pieters* v. *Thompson* (1).

Millar, Q.C., and *H. Burton Buckley*, for the Plaintiffs:—

The only thing wanting to make *Pieters* v. *Thompson* applicable is the letter, which it appears the defendant's agent wrote to the defendant in that case, mentioning the fact that the plaintiff had made his election to proceed in the foreign Court. Such a fact is wanting here.

On the other hand there is authority to shew what the Court will not do in the way of interference: *Cox* v. *Mitchell* (2); *McHenry* v. *Lewis* (3).

The present action is no longer for goods, it has become an action for damages only.

Joyce, in reply:—

There must have been an order to elect in *Pieters* v. *Thompson* (4).

(1) Coop. G. 294.

(2) 7 C. B. (N.S.) 55.

(3) 21 Ch. D. 202.

(4) It appeared from a subsequent examination of the entries in the Registrar's books respecting *Pieters* v. *Thompson* (1814 B. 768), that on the 6th of May, 1815, the Defendants obtained an order *ex parte* for the Plaintiff to elect between the suit in the English Court and the proceedings in the Dutch Court at *Amsterdam*, which were for an attachment upon the goods of the Defendants in the hands of certain persons there. An order was afterwards made to take the Defendants' answer off the file, by which the order to elect became abortive. An answer having been put in, Sir *S. Romilly* on the 14th of July, 1815, moved to stay the proceedings, but the motion was ordered to stand over for the production of an affidavit. On the following day an affidavit was produced to the effect that the Plaintiff had in *Amsterdam* renounced the proceedings in *England*; and the Lord Chancellor (Lord *Eldon*) then made an order to stay proceedings, as reported. It does not appear that the order was drawn up, but no further proceedings were taken in the English suit.

Cases in which the Court has restrained proceedings here, there being litigation pending elsewhere in respect of the same subject-matter are, *The Mali Ivo* (1); *The Catterina Chiazzare* (2).

BACON, V.C.:—

It seems to be agreed that there is no authority on which the Court can rely one way or the other for this application. The suit in this country alleges that the Defendants are in possession of cargoes to which the Plaintiffs lay claim, and the claim asks that the Defendants may be ordered to deliver those cargoes, or in the alternative to pay damages amounting to £100,000, but in the alternative only. Then it turns out that although the Defendants may be in possession of these goods, the goods are not in this country, so that there can be no application *in rem* in this country relating to the cargoes; no appointment of a receiver, or any other process by which the Court can take into its possession the thing in dispute. Then the Plaintiffs, after instituting this suit in this country, find that they can have the relief which by the first prayer of the claim they desire to have, namely, the actual possession by delivery of the thing in question, by proceedings in *France*. I cannot say that the suits are directly alike, or that there is no distinction in the relief asked. Suppose that in *France* the present Plaintiffs should fail altogether, they may have a case in this country and they may get a decree in their favour. Suppose the Plaintiffs should succeed in *France;* the effect of that on this suit will be that whenever it comes on for hearing the Defendants will say, You have had that which you sought to have. Natural justice, it seems to me, does not furnish any ground upon which I can proceed.

The case referred to from Sir *George Cooper's* Reports certainly does not govern this case, because although Mr. *Ingle Joyce* says it must be assumed there was an order to elect, I can find no trace of that in the judgment. As reported the application was to compel the plaintiff to do that which he had promised to do. All that the Court then required was, proof that the plaintiff had elected; and upon that proof being furnished it stayed the proceedings in this Court. I do not think that case has any application to the case

(1) Law Rep. 2 A. & E. 356. (2) 1 P. D. 368.

C. A. 1883 PERUVIAN GUANO COMPANY v. BOCKWOLDT. V.-C. B.

now presented, nor has the case of *Cox* v. *Mitchell* (1) any application either, for the Courts of Common Law, I think I may say notoriously, had no jurisdiction on the subject of election; certainly in that case they were not asked to exercise any such jurisdiction. There the party applying had been held to bail under the statute 1 & 2 Vict. c. 110, s. 3; the proceeding therefore was most directly *in personam*, and the applicant asked to be released from that proceeding, because there was a suit pending in another country. One of the reasons given in the judgment of *Erle*, C.J. was, that it might suit the defendant's purpose very well to escape from the country in which the first suit was instituted, and come here, thinking he was safe, and set the plaintiff at defiance. The Court of Common Law therefore acted on the only authority it possessed, namely, the statutable authority. The man had been held to bail under circumstances which justified that proceeding, and the Court declined to interfere with it. They referred very pointedly to the circumstance that nobody in the Court of Common Law ever heard of such an application as to stay such proceedings as had been there taken, but there is not a trace of any judgment on the subject of election.

The cases before Sir *Robert Phillimore*, which are entitled to be treated, no doubt, with great respect, go much more pointedly to this application; but they were cases of collision between ships, and the jurisdiction was over the ships themselves. I cannot say in the present state of the authorities, which are imperfect, nor on the natural justice of the case, that the Plaintiffs, who claim the actual possession of these goods which they cannot get in this country, are debarred from making the same claim in another country, where it may be that they can obtain that possession, because they have asked here for possession, and, failing to obtain it, for damages. I can make no such order as Mr. *Ingle Joyce* asks for.

The costs of the motion will be costs in the cause.

J. B. D.

C. A. From this judgment the Defendants appealed. The appeal came on for hearing on the 14th of February, 1883.

(1) 7 C. B. (N.S.) 55.

Davey, Q.C., and *Ingle Joyce*, for the Appellants:—

There is no doubt as to the jurisdiction of the Court to make an order for the Plaintiff to elect when he is bringing actions both in this country and in a foreign Court. It is a matter for the discretion of the Court: *McHenry* v. *Lewis* (1). *Pieters* v. *Thompson* (2) is in our favour. It is clear from the examination of the Registrar's books that an order to elect was made in that case. A similar order was made in *Prioleau* v. *United States* (3), and in *United States* v. *Wagner* (4). In the present case the institution of the action in the French Court was vexatious. It gives no real advantage to the Plaintiffs and causes additional expense to the Defendants.

[*Millar*, Q.C.:—If the Plaintiffs are successful in their claim they will more easily obtain execution against the Defendants in *France* than in *England*.]

It is objected that the English and French actions are not entirely for the same object, as the English action embraces the cargo of one ship which is not in question in the French action. But we ask that the Plaintiffs may be put to a special election with respect to the cargoes which were included in the French suit and be at liberty to proceed in the English action as to the other. The Court often makes an order in this form where the relief sought in two suits is not identically the same, otherwise a plaintiff might easily evade the rule of election, as the Plaintiffs have attempted to do in this case: *Barker* v. *Dumaresque* (5); *Anon.* (6); *Seton* on Decrees (7).

Millar, Q.C., and *H. B. Buckley*, for the Plaintiffs, were not called on.

JESSEL, M.R.:—

It is very important in these cases that the Court should clearly see that in stopping an action it does not do injustice. Of

(1) 22 Ch. D. 397.
(2) Coop. G. 294.
(3) Reported on another point, Law Rep. 2 Eq. 659.
(4) Reported on another point, Law Rep. 2 Ch. 582.
(5) 2 Atk. 119; S. C. Barnardiston's Ch. Rep. 277.
(6) 1 Vern. 105.
(7) 4th Ed. p. 290.

C. A.
1883
PERUVIAN GUANO COMPANY v. BOCKWOLDT.
Jessel, M.R.

course a man brings an action at the peril of costs if the action does not succeed, and as a general rule that is sufficient to protect defendants from ill-founded actions. There is another protection, which is that where the action is vexatious it may be stayed. Now it may be vexatious on many grounds. It may be so utterly absurd that the Judge sees it cannot possibly succeed, and that it is brought only for annoyance, and then the Judge has jurisdiction to stay the action. That is pure vexation. Or it may be vexatious in another way; that is the plaintiff not intending to annoy or harass the defendant, but thinking he would get some fanciful advantage, sues him in two Courts at the same time under the same jurisdiction—two of the Queen's Courts. That is vexatious, because whatever the intention of the plaintiff may be he cannot get any benefit in that way, and the defendant is harassed by two suits.

Now similar, although not perhaps the same, considerations apply in a case where the actions are brought, one in a foreign country and one in this country. I have recently had to consider the matter in the case of *McHenry* v. *Lewis* (1), and I went so fully into it that I do not think it is necessary for me to discuss the rule further. It may be put, as regards this case, shortly in this way: that it is not vexatious to bring an action in each country where there are substantial reasons of benefit to the plaintiff. He has the right to bring an action, and if there are substantial reasons to induce him to bring the two actions, why should we deprive him of that right? It is very unpleasant, no doubt, to be sued twice—it is unpleasant to many people to be sued once—but still that does not make it vexatious where the plaintiff seeks to get a real substantial advantage. As I put it in that case, suppose in the one action he could get execution against Messrs. *Dreyfus*, being resident in *France* and having large property in *France*, whereas they are not resident in *England* and have no property here, that might be a good reason for suing them in *France*, and that might seem a reason for doing so when the action here is so advanced that he sees his way to a verdict here. He says, "I shall get a verdict and judgment, but that will not avail me unless I can get execution? Therefore I will go on with my English

(1) 22 Ch. D. 397.

action, and I will use the verdict and judgment in the French action with the view of getting judgment and execution there." All that seems to me not unreasonable, and certainly not vexatious. That, I think, is one ground for declining to interfere.

But there is another ground. The Plaintiff says his action in *France* does not relate to the same number of ships as the action in *England* does. Mr. *Joyce* puts it that this was a device to escape the rule, but if it does escape it is a very good device. Take this case, a man has a right to six cargoes under the same title. The Defendant has a place of business in *England*, and a place of business in *France*. He brings an action for three cargoes in *England* and three in *France*. Why may he not do so? He may think he may get sufficient to satisfy a judgment in *England* for three cargoes, but not for six. You could not stop the action in either country on the ground that the six cargoes were sued for under the same title. He, in fact, brings two actions for two different subject-matters. Now does it make any difference that the action is for six in one country and one in the other? It appears to me it cannot be so. He has a right to sue in each country for a different subject-matter.

That brings me to the substance of the case. Supposing the Plaintiff elected to go on with his French action for the six and in *England* for one, which is what is suggested on the part of the Defendants he might do—specially elected, as it is called—what good would that be to anybody? The two actions would go on, and all that is suggested is that a witness or two less would be required possibly, not necessarily, in carrying on the litigation. That is not a ground for putting a man to his election. I asked for any precedent, if any could be found, for putting a man to his election simply because he might have to call a witness or two less in one of the two actions, and I need not say that no such precedent can be produced. All the election rules go on the doctrine that you could put a final stop to at least one action, and this appears to be quite a novel attempt, and an attempt which is not founded in reason, for it is no sufficient reason to stop a Plaintiff to say that you can have a little less evidence in one action or try it in a less expensive mode. It seems to me that this also is a reason for our not interfering. Again, the fact that

C. A.
1883
PERUVIAN GUANO COMPANY v. BOCKWOLDT.
Jessel, M.R.

there is no precedent for such an interference is also a reason for this Court not interfering. I think it would have been discovered a long time ago, and a precedent could have been found for an election, not between two actions, but between so much of the subject-matter of one action as is embraced in another. I think the absence of precedent is not immaterial; and considering the danger of our depriving men of the opportunity of asserting their rights, which they are asserting *bonâ fide*, unless we arrived clearly at the conclusion that the asserting of them was vexatious, I think we ought to be slow to extend the doctrine beyond the case to which our attention has been called.

For these reasons I think the appeal motion fails, and the appeal should be dismissed with costs.

LINDLEY, L.J.:—

I am of the same opinion. The principles by which the Court ought to be guided in applications of this nature were fully examined and discussed in the case of *McHenry* v. *Lewis* (1). That case appears to me to be a most valuable decision. As I understand it it comes to this, that where the plaintiff is suing in this country and also abroad in respect of the same matter, and a motion is made to compel the plaintiff to elect, it is not sufficient for the person so moving to point out that there are two proceedings being taken with reference to the same matter; he must go a step further and shew that there is vexation in point of fact, that is to say, that there is no necessity for harassing the Defendant by double litigation. Moreover, I think the Court ought to be very cautious before it interferes in cases of that kind, and for this reason: The Court here is not and cannot be alive to all the advantages which a person may expect to derive from suing in the foreign Court. This Court does not know with accuracy, unless the matter is brought to its attention, what reasons there may be for preferring one Court to another. If in any case it is established that there is nothing except vexatious litigation, there is ample jurisdiction in this Court to make the order asked, but we ought to take care what we are about; and I am bound to say in this case I do not see my way to make such an order as

(1) 22 Ch. D. 397.

is asked. In other words, I do not see that there is such vexation in this case as to justify our interference.

Apart from the fact that the action in *France* is for six cargoes, and the action here is for seven, there are certainly reasons, not frivolous reasons, not harassing reasons, for bringing the action in *France*. We cannot compel the Plaintiffs to abandon that action. The fact that the action in *France* is for six cargoes, and the action here is for seven, prevents us from making the common order to elect between the two actions. If we were to compel the Plaintiffs to elect so far as the six cargoes are concerned we should not attain the result desired; we should not wholly stop one action out of two; both would be going on, viz., one in *France* for six cargoes, and one in *England* for the seventh. I think the appeal ought to be dismissed with costs.

BOWEN, L.J.:—

I am of the same opinion. I think the law is clear enough. The difficulties that arise are the difficulties of administering or applying it. When a plaintiff comes into an English Court he asks for justice. The Court is bound therefore not to refuse to hear his case, or to put him under difficulties in the way of having his action brought to a conclusion. Of course that rule does not mean that a plaintiff, under the pretence of asking for justice, is to do that which is oppressive and vexatious, and the Courts have always at Common Law, with which I am more familiar, and no doubt in Equity also, interfered to prevent a plaintiff under colour of asking for justice from harassing others. Therefore, when that which he is asking for is frivolous, or sometimes when he is asking for it in a way which necessarily involves injustice, the Courts have interfered.

It seems to me that the principle upon which a plaintiff is put to his election, when it is suggested that a double action is being pursued, is a branch of this general law. The reason you put him to his election, and compel him to decide whether he will go on with one or the other suit, is that the prosecution of the actions simultaneously appears to the Court to be necessarily attended with injustice. It is really a branch of the general law.

How are we to apply that doctrine to concurrent actions in our

C. A. 1883 PERUVIAN GUANO COMPANY v. BOCKWOLDT. Bowen, L.J.

own and foreign Courts? It seems to me we have no sort of right, moral or legal, to take away from a plaintiff any real chance he may have of an advantage. If there is a fair possibility that he may have an advantage by prosecuting a suit in two countries, why should this Court interfere and deprive him of it? The present case has illustrated during its progress the necessity of being very careful in exercising on behalf of the Court this sort of dictatorial power of interfering with actions. For it turned out in the course of the argument that the French suit has this advantage, that the Plaintiffs can get, or think that they can get execution more easily in *France*, and with more completeness against Mr. *Dreyfus* than if they rested only on the English action. That seems to me to illustrate exactly what was said by the Court in the case of *McHenry* v. *Lewis* (1), and what I think ought always to be in the mind of the Court before interfering with these actions. Persons who sue in different countries very often have reasons for doing so that are not easily explained. There may be many reasons why a French action at the same time as an English action may not be vexatious or unreasonable. One obvious reason has been pointed out to us, and that is the facility of execution in the French action. I am myself very much impressed by the fact that although now we have had two cases within the last two months on this point neither in the one case nor in the other have we had anything like a precedent shewn us for interference on the part of the Court in this country to prevent double litigation when the double litigation has no other element of oppression than this, that an action is going on simultaneously abroad, which will give other or additional remedies beyond those attainable in *England*.

Solicitor for Defendants: *G. M. Clements.*
Solicitors for Plaintiffs: *C. & S. Harrison & Co.*

(1) 22 Ch. D. 397.

M. W.

In re WILLIAM PHILLIPS' INSURANCE.

C. A.
1882
V.-C. B.
Aug. 3.
C. A.
1883
Feb. 26.

Customs Annuity and Benevolent Fund—Power of Subscriber to bequeath Sum assured.

The *Customs Annuity and Benevolent Fund* was established, for the benefit of the widows, children, or other relatives of officers of the Customs, by Act of Parliament, which gave power to frame rules for its management. By the rules it was provided that the fund should be raised by subscriptions on the principle of life insurance, and should form a fund for the benefit of widows, children, relatives, and nominees of the subscribers. It was provided that the admission of a nominee by the directors should take place during the life of the subscriber; that the capital money forthcoming at a subscriber's death under his insurance should, subject to the regulations thereinafter contained, be appropriated according to the directions contained in his will or in any instrument deposited with the directors as therein mentioned; that the widow's share should not be less than one-third, or a life interest in two-thirds, and that the remainder should be applied according to the directions of the subscriber for the benefit of his widow, children, blood relations, or any of them, or his nominee or nominees who had been duly admitted by the directors; that if the widow was otherwise provided for as therein mentioned the whole money should be subject to the directions of the subscriber "in favour of his widow, children, blood relations, or nominees, or any of them as aforesaid;" that if the widow received the income of two-thirds the capital of the two-thirds should be held, subject to the directions of the subscriber, to take effect at the death of the widow, and the remaining capital, subject to the directions of the subscriber, to take effect at his own death; that if the widow was provided for as thereinbefore mentioned, or if there was no widow, then the whole capital should be "subject to the directions of the subscriber as aforesaid;" that if a subscriber died leaving issue without having by will or such other instrument as aforesaid directed the application of the capital placed at his disposal, it should go to his children and the issue of deceased children as therein mentioned, and if none, to his next of kin. A subscriber died a widower leaving children. No nominee had been accepted by the directors in his lifetime. By his will he bequeathed the fund coming from his insurance to a stranger in blood:—

Held, by *Bacon*, V.C., that the legatee was entitled:

Held, by the Court of Appeal, that the subscriber had no property in the fund, but only a limited power of appointment over it, and that this power could only be exercised in favour of his widow, children, blood relations, and nominees admitted by the directors in his lifetime; that he had therefore no power to bequeath the fund to a stranger in blood who had not in his lifetime been accepted by the directors as a nominee, and that the fund therefore belonged to the children.

WILLIAM PHILLIPS in 1840, 1845, and 1849, insured in the *Customs Annuity and Benevolent Fund*, established by the Act

C. A. 1883

In re WILLIAM PHILLIPS' INSURANCE.

56 Geo. 3, c. lxxiii., for the benefit of the widows and children or other relations of persons employed in the Customs.

By the above Act a committee was formed to make rules for regulating the fund and for appointing directors and other officers, which rules when approved by the Commissioners of Customs, and ratified by a Judge, were to have the same force as if they were embodied in the Act. It was enacted that a poundage should be levied on the salaries of all persons engaged in the Customs for the benefit of the fund, with a power to any persons then so engaged to give notice that they objected to it, in which case they were excused from paying it, but became incapable of becoming subscribers to the fund.

By sect. 9 it was enacted "that the said directors shall and may if they shall deem it expedient admit any person or persons to be the nominee or nominees of any subscriber to the said fund who may not be a relative or relatives of the said subscriber, and the said nominee or nominees so admitted shall and are hereby declared to have and thereafter to continue to have to all intents and purposes the same and the like interest in the said fund and in the advantages thereof as if the said nominee or nominees had been a relative or relatives of the said subscriber under and subject in every respect to the rules and regulations approved and ratified as aforesaid."

The fund was raised by subscriptions on the principle of life insurance, which voluntary subscriptions together with the poundage formed a fund for the widows, children, relatives, and nominees of persons employed in the Customs. Rules were from time to time made, approved of, and confirmed in manner provided by the Act. The rules in force before 1866 will be found in *Attorney-General* v. *Abdy* (1). By the Act 34 & 35 Vict. c. 103, the clause of the above Act which authorized the levying compulsory poundage was repealed, and in 1872 a new set of rules was duly made, all former rules being abrogated, but with a saving of the rights of insurers under the old rules. The material provisions in the new rules were as follows:—

"1. The *Customs Annuity and Benevolent Fund* shall continue to be raised by subscription upon the principle of life insurance,

(1) 1 H. & C. 266.

and shall form a fund for the benefit and relief of widows, children, relatives, and nominees, of officers or persons belonging to the department and under the control of Her Majesty's Customs, and the admission by the directors of a nominee or nominees of subscribers under the said Act shall as to the person of such nominee or nominees take place during the lifetime of such subscriber. And any such admission may from time to time be revoked or annulled by the subscriber at his will or pleasure, or by the directors at their discretion where they shall have just cause to believe that such admission has been procured in fraud of the principle and policy of the fund. Every nominee of a subscriber shall be entitled to such proportion only of his insurance in the fund as shall be limited and directed by the subscriber in conformity with these regulations."

"11. The directors may during the lifetime of a subscriber at his instance exclude his widow from all benefit of the fund on account of misconduct on her part proved to their satisfaction."

"12. The capital money forthcoming at a subscriber's death by virtue of his insurance shall, subject to the following regulations, be appropriated according to the directions contained in his will or codicil or in any instrument in writing signed by him in the presence of an attesting witness and deposited with the directors during his lifetime or within three calendar months after his death, and which instrument may, at the option of such subscriber, be made absolutely irrevocable, or in default of any such directions in manner hereinafter prescribed. Provided always, that where no such instrument in writing shall have been so deposited as aforesaid, but one shall subsequently be found duly signed and attested as aforesaid, the directors may, if they think fit, receive and act upon such last mentioned instrument at any time before the money forthcoming under the insurance shall have been paid or appropriated, but after such payment or appropriation shall once have been made no instrument or writing containing other directions not deposited with the directors as aforesaid shall have any force or effect whatsoever."

"The widow's share of the capital money forthcoming by virtue of her husband's insurance shall not be less than one-third if appropriated in creation of an annuity, nor less than the interest

C. A. 1883 *In re* William Phillips' Insurance.

for her life of two-thirds if set apart for investment, and in either case the remainder of the said capital money forthcoming shall be subject to the directions of the subscriber, and shall be applied or paid in any manner or proportions he may think fit for the benefit of his widow, children, blood relations, or any of them, or his nominee or nominees who shall have been duly admitted by the directors.

"If an annuity be insured under Table A. for the benefit of the widow equal in amount to the annuity which one-third of the capital money would create according to the rates of Table C, or equal to the interest of two-thirds of such capital money as aforesaid when invested, or if it shall be shewn to the satisfaction of the directors that an inalienable provision equal in amount to either of the above, as the case may be, from any other source whatsoever is secured to or for the benefit of the widow for her life, then the whole of the said capital money shall be subject to the directions of the subscriber in favour of his widow, children, blood relations, or nominees, or any of them, as aforesaid.

"But if the annuity insured under Table A and the said income from other sources shall not together be equal in amount to the required annuity under Table C, or to the interest of two-thirds of the capital money, as the case may be, then a sum shall be set apart out of the widow's capital money sufficient to make up the said annuity according to the rates of Table C, or such interest as aforesaid, and the remainder of the said capital money shall be subject to the directions of the subscriber as aforesaid."

Then followed a provision for applying the whole fund for the benefit of the widow if the subscriber died without issue and without having made any disposition of the fund.

"Provided also that the capital money directed by the subscriber to be set apart for investment as aforesaid shall be invested in the purchase of £3 per cent. stock, or such other security mentioned in rule 20 as the directors shall see fit, in the names of the trustees of the fund, and the amount of the stock so purchased or other security shall be held by them subject to the directions of the subscriber under these regulations, to take effect at the death of the widow, and the remaining capital money shall be

subject to the directions of the subscriber to take effect at his death.

"If the widow be provided for in the manner aforesaid, or if she be excluded from all benefit in the fund on account of misconduct, or if there be no widow, then the whole capital fund shall be subject to the directions of the subscriber as aforesaid.

"If a subscriber die leaving issue without having by will or such other instrument as aforesaid directed the application of the capital money herein placed at his disposal, the same shall become the property in equal proportions of such of his children as shall be living at his death and the issue of such, if any, as shall be then dead leaving issue then living, such issue to take amongst themselves in equal proportions the shares to which their parent or respective parents would have been entitled if living."

[A provision for cases where the capital does not exceed £150.]

"If there shall be no widow, child, or other issue as aforesaid of such subscriber, the whole capital money shall belong to the person or persons entitled as his next of kin according to the *Statute of Distributions*, and shall be paid to the legal personal representatives of such subscriber in trust for such person or persons; but the receipt of the said legal personal representatives shall effectually discharge the directors of the said fund from seeing to the application of such capital money."

The sums for which *Phillips* subscribed amounted to £1000, which amount was increased by bonuses to £1751.

No nominee was ever admitted in accordance with rule 1 during the life of *Phillips*.

Phillips died in December, 1881, a widower, leaving three children. He left a will, made a few days before his death, by which he gave his estate and effects real and personal (expressly including his insurance in the Customs Fund) to *Mary Ann Haynes* (a stranger in blood) for her sole and separate use.

Conflicting claims to the fund being set up by *M. A. Haynes* and by the children it was paid into Court under the Act for the relief of trustees.

A petition by the children for payment out of the fund to them came on before Vice-Chancellor *Bacon* on the 3rd of August, 1882.

C. A. 1883 *In re* WILLIAM PHILLIPS' INSURANCE.

George Henderson, for the Petitioners:—

The nature of the testator's interest is stated by Baron *Bramwell* in the parallel case of *Attorney-General* v. *Abdy* (1) thus: "Mr. *Abdy* entered into an engagement with the directors of the *Customs Annuity and Benevolent Fund*, whereby on certain payments being made by him during his life, he acquired a right to appoint a sum of money on his death, either for the benefit of his widow, if he had one, or, if not, of his relatives or nominees, if accepted by the directors." This legatee was not a nominee, and never having been nominated to the directors, was never admitted by them. There being no nomination the children are entitled.

Marten, Q.C., and *George Murray*, for the legatee:—

Under these rules the testator had (rule 12) a general power of appointment, to exercise which it was not necessary for him to do more than to make his will. Nomination by the will itself is impossible: *In re Maclean's Trusts* (2); *In re Pocock's Policy* (3).

In *Abdy's Case* it does not appear that there was any nomination, or any previous application to the directors, and the legatee was held entitled as a matter of course.

Rule 12 provides that if there be no widow (as here) then the whole capital fund shall be "subject to the directions" of the subscriber; and if a subscriber die leaving issue "without having by will . . . directed the application of" the capital, the fund is to become the property of the children.

H. Burton Buckley, for the secretary of the fund.

Henderson, in reply:—

In the argument, cases in which admission by the directors is requisite have been mixed up with those in which it is not. The first objects are, the widow, if any; then the children, if any; and then a duly admitted nominee. Sect. 9 of the Act (56 Geo. 3, c. lxxiii.) is the only one which relates to the admission of nominees, and it is framed in stringent terms. Only if the

(1) 1 H. & C. 266, 299. (2) Law Rep. 19 Eq. 274.
(3) Law Rep. 6 Ch. 445.

directors deem it expedient (and here it cannot be said that they have deemed it expedient), are they to have power to admit a nominee, and the nominee, if and when admitted, is only to have the same and the like interest as if he or she had been a relative.

Then rule 1 declares that the admission may be revoked by the directors at their discretion, shewing the essential nature of the control which they are bound to exercise. In *In re Maclean's Trusts* (1) the mortgagees were duly admitted by the directors; so that that decision can have no application.

Bacon, V.C.:—

The argument on behalf of the Petitioners has been that inasmuch as there was no nomination by this testator in his lifetime, admitted by the directors, therefore the will is inoperative as to this fund.

I do not accept that argument. If I rightly understand the policy on which the Act of Parliament proceeded it was this. The Legislature thought it right to encourage a saving by the servants employed in the Customs, and that being so, there is a plain provision that the benefit secured by the insurance shall as to one-third of it go to the widow, if there be a widow. In this case there is no widow. Subject to that, there is not one word in the Act of Parliament or in the rules and regulations to interfere with the power of the man who has contributed by way of subscription out of his salary, or out of his means, to direct how his proportion of the insurance fund is to be disposed of after his death. That he had a property in a share of the fund nobody can doubt. The right of appointing such share is not a power which would have enabled him to withdraw his share in the fund, or to spend it, but it was a power to dispose of it. That power remained in him to the day of his death, and it was not exercised by him until the day of his death.

The 12th rule which has been referred to is in very plain terms. Having abrogated all the previous rules (which I do not think it is necessary to refer to), the 12th rule enacts (and it is equivalent to an Act of Parliament) that "the capital money forthcoming at a subscriber's death by virtue of his insurance shall, subject to

(1) Law Rep. 19 Eq. 274.

C. A. 1883 *In re* WILLIAM PHILLIPS' INSURANCE. V.-C. B.

the following regulations, be appropriated according to the directions contained in his will or codicil, or in any instrument in writing signed by him in the presence of an attesting witness, and deposited with the directors during his lifetime or within three calendar months after his death, and which instrument may at the option of such subscriber be made absolutely irrevocable, or in default of any such directions, in manner hereinafter described." Then comes the proviso which throws light on the enactment, "Provided always that where no such instrument in writing shall have been deposited as aforesaid, but one shall subsequently be found duly signed and attested as aforesaid, the directors may, if they think fit, receive and act upon such last-mentioned instrument at any time before the money forthcoming under the insurance shall have been paid or appropriated, but after such payment or appropriation shall once have been made, no instrument or writing containing other directions not deposited with the directors as aforesaid shall have any force or effect whatsoever." That is a different set of directions. If the directors, upon representations made to them and in the absence of any will or other instrument, pay the money, and if they have reason to believe that there are no such directions they are indemnified in so doing. That is the meaning of it. It being in the power of the man whose money has been subscribed to dispose of his share in the fund in any manner he may think fit by his will, a nomination of the legatee upon the law as it stands on the regulations, is in my opinion, not necessary.

It has been argued that in consequence of this legatee's name not having been communicated to the directors in the testator's lifetime, she can take no benefit under his will. That would be a most violent conclusion to come to. It is contended that the directors to whom the nomination may be made are to have the power of vetoing it. Suppose some person were nominated whom the directors did not approve of, is that to prevent a disposition of the property according to the testator's will? Is it to be subject to their caprice in that way? Certainly not. It is convenient and customary in the administration of the fund that the directors should know who is nominated; but it is not imperative that the person to whom the property belongs should

nominate. If in this case the man had made a mortgage which had been communicated to the directors, what could the directors do? They could not veto it and they could not exercise any power over it. These directors are not an inquisitorial body appointed to consider whether the testator was prudent, or wise, or right, in making the nomination he did. The rules when taken in the broadest view cannot be applied in such a manner. This property was in the disposal of the testator. His right of disposal was limited only in case he left a widow. It was so from the beginning by force of the contract. In my opinion there is no ground whatever for the contention which seeks to set aside the will.

The fund, after payment of succession duty, will be ordered to be paid out to the legatee.

Marten asked that the Petitioners should pay the costs of the payment into Court.

Henderson admitted that according to the decision in *In re Maclean's Trusts* (1) that would be so.

J. B. D.

The children appealed, and the appeal was heard on the 26th of February, 1883.

Davey, Q.C., and *George Henderson*, for the Petitioners:—

We contend that under the Act and rules there is no power in a subscriber to bequeath the money away from his family, no nominee having been accepted by the directors in his lifetime. The old rules are to be found in *Attorney-General* v. *Abdy* (2). There may be a question whether this case falls under the old rules or the new, but the point is unimportant, for the old and new rules are substantially the same.

[*Marten*, Q.C.:—The Respondent admits that to be so.]

The first decided case bearing on the construction of the rules is *Attorney-General* v. *Rowsell*, referred to in the 2nd edition of *Tilsley* on Stamps (3), in which it was decided that the insured had

(1) Law Rep. 19 Eq. 274. (2) 1 H. & C. 266.
(3) Page 685.

C. A. 1883 — *In re* William Phillips' Insurance.

no general power of testamentary appointment, and that therefore legacy duty was not payable. A fund which a person could appoint as he pleased would for the purposes of legacy duty be part of his estate. In *Attorney-General* v. *Abdy* (1) it was decided that succession duty was payable. In *In re Maclean's Trusts* (2) it was decided that mortgagees had a good title, but they had been admitted as nominees during the life of the insured, and the trusts upon which they held the fund made the surplus part of the mortgagor's estate. *In re Pocock's Policy* (3) is in no way opposed to our contention, for the disposition in that case was a disposition in favour of the daughter.

Marten, Q.C., and *G. Murray*, *contrà* :—

We contend that according to the rules the insured may dispose of the fund generally by will or by instrument deposited with the directors, and that *In re Maclean's Trusts* is a complete authority in support of this contention. The admission of nominees is directory only, and is not a condition precedent to the power of disposing of the fund. It would be most inconvenient to adopt a construction which makes a will inoperative unless there is an admission of a nominee by act *inter vivos*. In *In re Pocock's Policy* Vice-Chancellor *Malins* considered the directions as to the acceptance of a nominee to be directory only, and that not negativing a nominee was acceptance, and the decision of the Court of Appeal does not conflict with this.

Jessel, M.R. :—

I think there is no substantial difference between the two sets of rules, though I agree that the wording of the second set is not quite so clear as that of the first. I think that under each set of rules the insured has a power of appointment, and nothing more. The wording of the 12th rule is a little embarrassed by the use of the words "as aforesaid," which occur three times and may refer to two different things; but it is obvious to my mind, when we look at the alternatives, that the rules were intended to remain in substance as they were at first. That being so, there are two decisions

(1) 1 H. & C. 266. (2) Law Rep. 19 Eq. 274.
(3) Law Rep. 6 Ch. 445.

on the first set of rules, the *Attorney-General* v. *Rowsell* (1) and the *Attorney-General* v. *Abdy* (2), and they both tend to the same conclusion that there is a mere power of appointment, and in default of appointment the fund goes to the persons mentioned in the rules. If there is no widow and no nominee, it goes to the children. Is there any exercise of the power of appointment? I think there is not. The original Act of Parliament took away a certain sum out of the salary of the insurer, which when taken away ceased to be his, and gave him instead of it certain rights, but these rights had really no direct reference to the person paying. The moneys which he was to receive under his insurance did not arise entirely from moneys taken out of his salary. It is plain that many of the officers who were compelled to subscribe would get no benefit out of the fund. That being so, is there anything inconsistent in leaving the directors to say whether or not a nominee of the insured should be accepted? It is quite possible, and I think it was intended by the original Act, that the directors should have a discretion, and should have authority to say, if a man had a wife and several children, that he should not exclude them, and should not be entitled to compel the directors to accept his nominees. No doubt the object of the original Act was to protect the Treasury from claims by the widows and children of these officers by compelling the officers to provide in their lifetime for their widows and children by compulsory savings—for that is what it comes to. That is the primary object of these provisions, and it is quite consistent with that for the insured only to have such powers of appointment as were given him by the rules, and no right of property in the sum insured. I think that is the true view of both sets of rules, and, consequently, that in this case, no nomination having been registered in the lifetime of the officer, there is no nominee who can take, and the children therefore are entitled to what they ask. It follows that the decision must be reversed.

Sir J. Hannen :—

I am of the same opinion. At first sight, of course, one is disposed to deal with the case on the footing that a man should be

(1) Tilsley on Stamps, 2nd Ed. p. 685. (2) 1 H. & C. 266.

C. A. 1883 *In re* William Phillips' Insurance. Sir J. Hannen.

allowed to deal with his own property by will; but the fallacy of that view is this, the sum insured is not, if you look to its origin, the man's own property. Originally there was a compulsory subscription, not merely by the persons insuring, but by the other officers of the Customs, to make a fund to provide the widows and children of subscribers with the means of subsistence, and that view of the matter sufficiently accounts for the limitations imposed upon subscribers. Originally there does not appear to have been any power to dispose by will, but only by nomination, and I have no doubt that the intention was to give the directors a discretionary power as to the persons whom they would admit to be nominees. Accordingly, it was necessary that the nomination should be accepted by them. Power is indeed now given to do something by will. Let us see what that power is. It is that the money payable under an insurance on the death of a subscriber "shall, subject to the following regulations, be appropriated according to the directions contained in his will or codicil," or in the instrument of nomination. What are the regulations which follow. We find this provision, that "The widow's share of the capital money forthcoming by virtue of her husband's insurance shall not be less than one-third, if appropriated in creation of an annuity; nor less than the interest for her life of two-thirds, if set apart for investment; and in either case the remainder of the said capital money forthcoming shall be subject to the directions of the subscriber, and shall be applied or paid in any manner or proportion he may think fit for the benefit of his widow, children, blood relations, or any of them, or his nominee or nominees who shall have been duly admitted by the directors." Therefore his power is limited to these persons who are named. The clause which more directly applies to the present case runs thus: "If the widow be provided for in the manner aforesaid, or if she be excluded from all benefit in the fund on account of misconduct, or if there be no widow, then the whole capital money forthcoming shall be subject to the directions of the subscriber as aforesaid." The directions which came within these words "as aforesaid" are the directions to distribute amongst the widow, children, blood relations, or nominees, *i.e.*, nominees who have been duly admitted by the directors. In the present case no nominees have been

admitted, and the bequest to a person who is neither wife, child, blood relation, or nominee is not a good exercise of the power. The money, therefore, belongs to the children under the clause which gives it to them in default of appointment. For these reasons I think the decision of the Vice-Chancellor cannot be supported.

LINDLEY, L.J.:—

The view taken by the Vice-Chancellor, as I understand it, was that this fund was really the testator's own. *Primâ facie*, the money payable under a policy of insurance which a man effects on his own life is his own, and *primâ facie* he can therefore dispose of it by will. But the rules of the society in which the insurance is effected may negative this probability; and the attention of the learned Judge does not seem to have been directed to the decision in *Attorney-General* v. *Rowsell* (1), which proceeds on the footing that the fund is not the property of the holder of the policy. It appears to me on looking carefully at the rules that the testator has not any property in the fund, but has only a limited power of appointment. That this is the true construction of the 12th rule is, I think, apparent from the clause relating to the next of kin; a clause which is absurd and superfluous if the money is his own, but which is perfectly consistent with the theory that he has only a limited power of appointment amongst the persons referred to in the rule. I think, therefore, that the appeal must be allowed, and an order made for the division of the money among the Petitioners.

Solicitor for Petitioners: *F. Foss.*
Solicitor for Respondent: *J. T. A. Patrick.*

(1) Tilsley on Stamps, 2nd Ed. p. 685.

H. C. J.

C. A.
1883
March 6

In re MADRAS IRRIGATION AND CANAL COMPANY.
WOOD *v.* MADRAS IRRIGATION AND CANAL COMPANY.

[1879 W. 13.]

Practice—Time for Appeal—Order in Winding-up and in an Action—Rules of Court, 1875, *Order* LVIII. *r.* 9.

An action was brought by a debenture holder of a company on behalf of himself and the other debenture holders to enforce their securities. After this an order was made for winding up the company. An arrangement was proposed for the making over the undertaking to the Secretary of State for *India* on certain terms, and an order was made in the winding-up and in the action sanctioning the arrangement and declaring that no moneys payable by the Secretary of State to the stockholders and debenture holders of the company under the arrangement should be treated as assets of the company. An unsecured creditor of the company, who did not know of this order at the time when it was made, applied after a lapse of more than twenty-one days from his receiving a copy of the order, but within the time for appealing from a final order in an action, for leave to appeal against it:—

Held, that as the applicant had no such interest that he could have been a party to the action the order must, as regarded him, be treated as an order made only in the winding-up, that Order LVIII. r. 9, applied, and that he was out of time.

THE above company was incorporated by the Act 21 Vict. c. viii., with a capital of £2,000,000, and under statutory powers the Secretary of State for *India* engaged to pay interest at £5 per cent. per annum on £1,000,000, part of this capital. This £1,000,000 was the only capital subscribed. The company under their powers of borrowing issued to the public a considerable amount of debentures, assigning all their property in *India* and all moneys receivable by them in *India* or *England*, except the interest guaranteed by the Secretary of State for *India*. The above action was brought by a debenture holder on behalf of himself and all the other debenture holders to enforce their securities. An order was made on the 26th of February, 1881, to wind up the company, and an official liquidator was appointed on the 23rd of March.

On the 16th of March, 1882, an order was made in the winding-

up and in the action under the power given by the *Joint Stock Companies Arrangement Act*, 1870, ordering that an arrangement proposed by a letter dated the 6th of November, 1880, written on behalf of the Secretary of State for *India* to the chairman of the company, and adopted by meetings of stockholders and debenture holders, should be sanctioned, and that the official liquidator should carry it into effect forthwith. And it was declared that no moneys payable by the Secretary of State for *India* under the arrangement were to be treated as assets of the company.

The arrangement in question provided that the Indian property of the company should be made over to the Indian government, and that on the transfer being completed the Secretary of State for India would pay £106 for each £100 of the company's stock, but would no longer be liable to pay the £5 per cent., and that he would also pay to the debenture holders £75 for each £100 of debenture debt held by them, and would pay £12,000 to the directors and chairman as compensation to their officers, and clerk, and themselves for loss of office and emoluments.

The arrangement was duly carried into effect soon after the above order had been made, and the sums payable by the Secretary of State to the shareholders and the debenture holders were paid. The debenture holders gave up their securities, and the assets of the company in *India* were given up to the Government.

T. Newson was the lessor of the offices in *London* which had been occupied by the company under a lease of the 6th of May, 1874, for twenty-one years from Lady Day 1874, at a rent of £300 per annum, payable quarterly—the lessees having power to determine the lease at the end of seven or fourteen years. The liquidator occupied the premises and paid the rent down to the 24th of June, 1882, inclusive, but declined to pay it any further. On the 11th of November, 1882, *Newson* took out a summons for payment of the Michaelmas rent, and for liberty to prove for future rent, and on the 27th of November an order was made for payment by the official liquidator out of the assets of the company of the Michaelmas rent, and liberty was given to prove for the amount of his further claim. On the same day *Newson's* solicitors were informed of the order of the 16th of March, 1882, having been made, and on the 2nd of December, 1882, the

C. A.
1883
In re MADRAS IRRIGATION AND CANAL COMPANY.
WOOD *v.* MADRAS IRRIGATION AND CANAL COMPANY.

solicitors of the official liquidator sent it to them for their perusal. On the 22nd of January, 1883, the official liquidator informed *Newson* that he had no assets of the company, but had received authority from the *India House* to pay the Michaelmas rent and the costs of the order of the 27th of November, which he accordingly paid. On the 24th of January *Newson* obtained a copy of the shorthand notes of the judgment delivered by Mr. Justice *Chitty* when the order of the 16th of March, 1882, was made, and on the 7th of February obtained a copy of the Acts of Parliament constituting the company. He was advised on these materials that he had ground to appeal, unless the creditors, other than debenture holders, had been represented before Mr. Justice *Chitty*. On the 12th of February he wrote to the solicitors of the official liquidator to know whether such other creditors had been represented, and on the following day was informed by them that no meeting of creditors, other than debenture holders, had been called, and that such other creditors had not been represented before Mr. Justice *Chitty*.

On the 13th of February, 1883, *Newson* gave notice of motion for leave to appeal from the order of the 16th of March, 1882. The motion was heard on the 6th of March, 1883.

H. A. Giffard, Q.C., and *C. J. H. Corbett*, for the motion:—

The applicant is an unsecured creditor who has been admitted to prove for future rent under the *Companies Act*, 1862, s. 158; *Buckley* on Joint Stock Companies (1); *In re Haytor Granite Company* (2). The order was a final order, and we should be entitled to indulgence as to time; *In re Jacques* (3), even if the order were only in a matter. But it is also an order in a suit as well as a matter, and Order LVIII. r. 9, does not apply. In the case of *In re Markham* (4) leave to appeal was given *ex parte* to a person who was interested, but not a party.

Macnaghten, Q.C., and *Alexander Young*, *contrà*:—

This, as regards the applicant, is not an order in a suit, but only in a matter.

(1) 4th Ed. p. 318.
(2) Law Rep. 1 Ch. 77.
(3) 18 Ch. D. 392.
(4) 16 Ch. D. 1.

[JESSEL, M.R.:—Can you say that when it is headed in a suit as well as a matter?]

Yes; he had no concern with the suit. If every person claiming any interest had been made a party to the suit he would not have been one, for the suit was only one for the benefit of persons having a charge on the Indian assets, and a mere unsecured creditor would have had no *locus standi*.

[JESSEL, M.R.:—That appears to be so. He is then out of time, and the only question is whether there is sufficient ground for relieving him from the lapse of time.]

We submit that there is not. The applicant took no steps to appeal for more than twenty-one days after he had the order in his possession. The appeal is frivolous, for if the applicant were to succeed there are no assets out of which he could be paid, the whole assets being subject to the prior claim of the debenture holders.

Giffard, in reply.

JESSEL, M.R.:—

I think that this case comes within Order LVIII., rule 9. It is not quite so clear as it might be, but when we look at the order sought to be appealed from I think it will be seen that the case is within the rule, because it appears to me that the order is an order in the action so far only as regards parties to the action, and persons who might have been parties to it. If a man is a party to a winding-up and not to an action, and an order is made in the action and in the winding-up, then, as far as he is concerned, it is an order in the winding-up only. The mere fact that another order, so to say, is on the same piece of paper, does not affect him, and *vice versâ* if he is a party to the action and not interested in the winding-up, the order, as far as he is concerned, is an order made in the action only. This would be plain enough in the case of an actual party. Here, however, the applicant is not an actual party. What does he claim? He claims to be in the same position as if he were a party to the winding-up. By no possibility could he have been made a party to the action, nor

C. A.
1883
In re MADRAS IRRIGATION AND CANAL COMPANY.
WOOD *v.* MADRAS IRRIGATION AND CANAL COMPANY.
Jessel, M.R.

can he claim to be in the same position as a party to the action. He comes, therefore, to be put in the same position as if he were a party to the winding-up, and as more than twenty-one days have elapsed since he was furnished with a copy of the order, he is out of time. We have, however, a discretion as to letting him in, and the question is, whether we ought to exercise that discretion in his favour. The only special circumstance in his favour is that he was not an actual party. The answer to that is, that the rules in the winding-up do not require the creditors to be actual parties. They are represented by the official liquidator. The allegation is that the official liquidator did not sufficiently perform his duty with regard to protecting their interests; but they are actually represented by the official liquidator, who ought to protect their interests. I am by no means satisfied that he did not perform his duty, nor am I satisfied that the unsecured creditors had any substantial interest to be protected. On the contrary, there has been a statement made to us on behalf of the official liquidator that there really were no assets out of which this alleged creditor could be paid. The assets in *India* were all pledged to the mortgagees, and the mortgagees only got £75 per cent. So that there was nothing for unsecured creditors. It is therefore idle for the applicant to say that his interests were not sufficiently protected. He does not come here in the position of a person who might have been a party to the action, but was not, and who asks for leave to appeal because his special interests are interfered with by the order. He is a member of a class who are represented by the official liquidator, and if he had appeared in the Court below he could not have been heard. The creditors are not allowed to be heard. The official liquidator is bound to represent them, and if he does not do his duty they can apply to remove him, and to have another person appointed in his place. There must be a very special case for a person who is represented by the official liquidator to have a right to be heard. I take it, it is incumbent on a person who comes here and says his interest has not been properly protected to shew that it is so, and, that being so, are we to give this gentleman, who claims as a creditor for about £200, liberty, on the ground that the liquidator has not properly performed his duty, to appeal for the purpose possibly of

upsetting a compromise involving payments which have already been made to the amount of a million and a half of money? It would require a very strong case to induce us to say that there was a miscarriage in the Court below, and I have heard no such case made. The application will therefore be dismissed.

BAGGALLAY, L.J.:—

As I understand that Lord Justice *Lindley* agrees with the Master of the Rolls in the opinion he has expressed, it would be immaterial were I to express a contrary opinion. I do not entertain a contrary opinion, but at the same time I am bound to say that I entertain considerable doubt whether this application is within the operation of Order LVIII., rule 9. The order against which Mr. *Giffard's* client seeks to appeal is made in the matter of the *Companies Acts*, and also in the action; but substantially what is done is done under the Acts. It appears to me that the effect of making that order in the matter of the Acts, as well as in the action, is to bind everybody who is interested. I have endeavoured to find out whether the particular creditor whom Mr. *Giffard* represents could be prejudiced by any order made in the action, and I have been unable to find out that such a case exists; but I do not think it clear, and I therefore express a doubt. If the creditor could not be prejudiced by any order in the action then the order is really and substantially an order in the matter only, and not in the action, and the 9th rule applies. Assuming that it does, I agree with the conclusion to which the Master of the Rolls and Lord Justice *Lindley* have come, and for the reasons given by the Master of the Rolls.

LINDLEY, L.J.:—

I am of opinion that the 9th rule applies to the present case. It provides that the time for appealing from any order or decision made or given in the matter of the winding-up of a company under the provisions of the *Companies Act*, 1862, shall be the same as the time limited for appealing from an interlocutory order under rule 15. It is true that the order is made not only in the winding-up but in the action. It does not, however, for

C. A. 1883 — *In re* MADRAS IRRIGATION AND CANAL COMPANY. — WOOD *v.* MADRAS IRRIGATION AND CANAL COMPANY. — Lindley, L.J.

that reason fail to satisfy the requisition of being an order under the *Companies Act*. If Mr. *Giffard's* client were a party to the suit, then there would be a difficulty; but as matters stand I see none at all, for he has nothing whatever to do with the suit. If we could see that any real injustice was done to him, that would be a ground for enlarging the time, and the delay might be explained, but it is difficult to see that any injustice has been done him. We ought to be very slow to give leave to appeal if the appeal is likely to end in nothing, and I am not satisfied that it would end in anything. On the other hand, having regard to the order made by Vice-Chancellor *Hall* in *Oppenheimer* v. *British and Foreign Exchange and Investment Bank* (1), I am not sure that it would not. If this gentleman had been in time, possibly he might have got something by his appeal; but the advantage to him is so speculative and the injustice to the other parties interested is so glaring, that as he is out of time I think we should be very wrong if we gave him leave to appeal.

Solicitors for Applicant: *E. W. & R. Oliver.*
Solicitors for Respondents: *Ashurst, Morris, Crisp, & Co.*

H. C. J.

C. A. 1883 — *March* 1, 8.

Ex parte BLAIBERG.
In re TOOMER.

Bill of Sale—Registration—Execution Creditor—Extent of Avoidance—Bankruptcy of Grantor—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 8.

The effect of sect. 8 of the *Bills of Sale Act*, 1878, in avoiding an unregistered bill of sale as against an execution creditor of the grantor is to avoid it only to the extent necessary to satisfy the execution.

Richards v. *James* (2) distinguished, on the ground that the words of sect. 1 of the *Bills of Sale Act*, 1854, are different from those of sect. 8 of the Act of 1878.

If after the sheriff under an execution has seized the goods comprised in an unregistered bill of sale to which the Act of 1878 applies, the bill of sale holder takes a sufficient possession before the filing of a bankruptcy petition on which the grantor is afterwards adjudicated a bankrupt, and the execu-

(1) 6 Ch. D. 744. (2) Law Rep. 2 Q. B. 285.

tion is then avoided by virtue of the relation back of the title of the trustee in the bankruptcy to an act of bankruptcy committed before the levy of the execution, the execution is swept away as if it had never existed, and the bill of sale holder is entitled to the goods as against the trustee.

THIS was an appeal from a decision of Mr. Registrar *Pepys*, acting as Chief Judge in Bankruptcy.

On the 3rd of March, 1882, *Frederick Toomer*, a trader, executed a bill of sale of his furniture, stock-in-trade, and other chattels in his shop to *Benjamin Blaiberg*, by way of security for the repayment of a sum of £400. The deed was never registered under the *Bills of Sale Act*, 1878, the Act then in force. On the 21st of March, 1882, *Toomer* signed a declaration of insolvency, which was filed in the *London* Bankruptcy Court at 12.30 P.M. on the 22nd of March. At 3.15 P.M., on the same day a bankruptcy petition, founded on that act of bankruptcy, was presented against him. At 2.30 P.M. on the same day the sheriff, acting under some writs of *elegit* issued by the *City Bank*, who were judgment creditors of *Blaiberg*, seized his goods in his shop. Immediately afterwards a bailiff, sent by the bill of sale holder, took possession on his behalf of the goods which the sheriff's officer had seized, and posted a notice on the window of the shop stating that the goods in it were the property of *Blaiberg* under a bill of sale. This notice was posted before 3 P.M. On the 29th of March *Toomer* was adjudicated a bankrupt. The seizure by the sheriff was admitted to be void as against the trustee in the bankruptcy. *Blaiberg* applied to the Court for an order declaring him entitled as against the trustee to the goods comprised in his bill of sale. The Registrar refused this application, on the ground that *Blaiberg*, before possession was taken of the goods on his behalf, had notice of an act of bankruptcy committed by *Toomer* previously to the filing of the declaration of insolvency.

Blaiberg appealed.

H. Reed, for the Appellant:—

There was no such act of bankruptcy committed as the Registrar supposed.

Cooper Willis, Q.C., and *Whiteway*, for the trustee.

C. A. 1883

Ex parte BLAIBERG. *In re* TOOMER.

THE COURT (*Jessel*, M.R., and *Baggallay* and *Lindley*, L.JJ.) held that the supposed prior act of bankruptcy had not been committed.

Cooper Willis, Q.C., for the trustee:—

The effect of the seizure by the sheriff was to avoid the bill of sale altogether, and then, the seizure itself being avoided by virtue of the relation back of the trustee's title to the filing of the declaration of insolvency, the trustee is entitled to the goods, the bill of sale being out of the way: *Richards* v. *James* (1).

H. Reed, for the Appellant:—

Richards v. *James* was a decision on sect. 1 of the *Bills of Sale Act*, 1854, which said that an unregistered bill of sale should "as against all sheriffs' officers and other persons seizing any property or effects comprised in such bill of sale in the execution of any process of any Court of law or equity authorizing the seizure of the goods of the person by whom or of whose goods such bill of sale shall have been made, and against every person on whose behalf such process shall have been issued, be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any personal chattels comprised in such bill of sale which at or after the time of . . . . executing such process, and after the expiration of the said period of twenty-one days, shall be in the possession, or apparent possession, of the person making such bill of sale." The words of sect. 8 of the *Bills of Sale Act*, 1878, which applies to the present case, are not the same; they are simply "shall be deemed fraudulent and void," instead of "shall be null and void to all intents and purposes whatsoever."

When it is said that the bill of sale is to be void as against the sheriff, the only natural meaning is that it is to be void to the extent necessary to satisfy the execution under which the sheriff seizes. Then, the execution being out of the way by reason of the relation back of the trustee's title, the bill of sale is unaffected by the seizure, and it is good as against the trustee, because a

(1) Law Rep. 2 Q. B. 285.

sufficient possession was taken by the bill of sale holder before the filing of the bankruptcy petition.

If *Richards* v. *James* (1) is right, then, if there had been no bankruptcy, and the execution had been withdrawn, still my bill of sale would be avoided. That could never have been the intention of the Legislature. The object was to protect the execution creditor, not to destroy the bill of sale. *Richards* v. *James* is not binding on this Court, and, indeed, in *In re Artistic Colour Printing Company* (2), doubts were expressed by *Jessel*, M.R., as to the accuracy of the decision. And in *Hunter* v. *Turner* (3) Lord *Blackburn* said (4) that the effect of *Richards* v. *James* had been misapprehended.

[BAGGALLAY, L.J., referred to *Edwards* v. *English* (5).]

That case is in my favour, and so is *Ex parte Leman* (6). The trustee in the present case is, as was the trustee in *Ex parte Leman*, endeavouring to avail himself of the title of a person whom he has himself ousted.

Cooper Willis, Q.C., and *Whiteway*, for the trustee:—

The words of sect. 8 are in substance the same as those of sect. 1 of the Act of 1854. The seizure by the sheriff was lawful at the time when it was made; if it is set aside because by construction of law the goods seized were really the goods of the trustee, that cannot make them the goods of the bill of sale holder. The bill of sale having been once avoided by the execution, it cannot be set up again. *Richards* v. *James* is a clear authority. The case is clearly within the mischief of the Act. Why should the bill of sale holder derive a benefit from the prior secret act of bankruptcy which avoided the execution? *In re Artistic Colour Printing Company* was a case under the *Companies Act*. In *Hunter* v. *Turner* there was only a *dictum*.

JESSEL, M.R.:—

Whatever view we take of this case the result will be a singular one, and one which was probably not contemplated by the Legis-

(1) Law Rep. 2 Q. B. 285.
(2) 21 Ch. D. 510.
(3) 32 L. T. (N.S.) 556.
(4) 32 L. T. (N.S.) 557.
(5) 7 E. & B. 564.
(6) 4 Ch. D. 23.

C. A. 1883

Ex parte BLAIBERG. *In re* TOOMER.

Jessel, M.R.

lature. I think the proper course is to read the section of the Act and to ascertain its meaning, and not to trouble ourselves about decisions upon the former Act. Any other course would be apt to lead us astray. If the later Act can clearly have only one meaning we ought to give effect to it accordingly. If instead of doing that we compare it with the former Act, and say that it differs from it only to such and such an extent, and then consider the decisions upon the former Act, we might in that way go back to half-a-dozen older Acts, and after considering the decisions on them, we might at last arrive at a conclusion exactly contrary to the later Act. I understand sect. 8 of the Act of 1878 to mean this: that an unregistered bill of sale is not to be void altogether, but only as against certain persons and under certain circumstances. In the first place, it is to be deemed fraudulent and void as against the trustee in the bankruptcy or liquidation of the grantor if at or after the time of the filing of the bankruptcy or liquidation petition, and after the expiration of the seven days allowed for registration, the goods are in the possession or apparent possession of the grantor. Similarly it is to be deemed fraudulent and void as against trustees or assignees of the grantor under an assignment for the benefit of his creditors, and as against all sheriffs' officers seizing any chattels comprised in the bill of sale in the execution of any process of any Court authorizing the seizure of the chattels of the grantor, and also as against every person on whose behalf such process shall have been issued. What is the meaning of being fraudulent and void "as against" a person who has a security upon or a demand against the goods? Surely it must mean void in order to give effect to that security or that demand. I cannot understand the words "as against" in any other sense. If it meant "void to all intents and purposes," why did not the Act say so? If the bill of sale is to be void as against the sheriff that must mean void for the purpose of letting in his claim. That is the obvious meaning. The bill of sale remains good as against the person who gave it. That seems to me to be the meaning of declaring a deed fraudulent and void as against a particular person; it makes it void merely to the extent of his claim. The result would be that if an execution was put in, without any bankruptcy of the grantor, the execution creditor must be

satisfied out of the goods in priority to the bill of sale holder. If the sheriff sold the goods for £100 and £10 only was due to the execution creditor, why should the execution debtor be entitled to the surplus, and to say that the bill of sale was void as against him, although it was not void before the execution was levied? So, again, if the execution was paid out by the bill of sale holder, why should the grantor be able to avoid the security? It appears to me that this is the plain meaning of sect. 8, and there is no occasion for us to go back to the words of the former Act. The words of the two Acts are very different, and I think I can see my way without any difficulty to the meaning of the words of sect. 8.

If this be so, the next question is, what is the effect of getting rid of the execution, not by paying it out, but in another way? The grantor has become a bankrupt, and the result of this is that the goods which the sheriff seized are, by virtue of the relation back of the trustee's title to the act of bankruptcy, to be deemed to have been the goods of the trustee at the time when the execution was levied. There was not, therefore, any execution levied upon the goods of the execution debtor; the execution was levied upon the goods of the trustee. That is the reason why the execution is got rid of, and it is no longer an execution within the words of sect. 8. It was so at first, but it is not now. It must now be treated for all purposes as an execution levied on the goods of the trustee. It is an execution against the wrong man, and the sheriff must go out of possession. He cannot even get his costs of the levy, because he has levied on the goods of the wrong man. He takes the risk when he levies of the bankruptcy of the execution debtor destroying his title to the goods. Applying the doctrine of relation back, we find that there was really no execution against the execution debtor. The execution creditor, therefore, is not entitled to any priority; he has no title whatever. Can it make any difference whether the debtor had no title to the goods at the time when the levy was made, or a title destroyed *ex post facto* as from a time anterior to the levy? I cannot see that it makes any difference. Sect. 8 was intended for the benefit of the execution creditor. The result is a most fortunate one for the holder of the bill of sale, and it may not be

C. A. 1883 *Ex parte* BLAIBERG. *In re* TOOMER.

one which was intended by the Legislature, but I cannot see my way to any other logical conclusion. The decision of the Registrar must be reversed.

BAGGALLAY, L.J.:—

I am of the same opinion, and on this short ground. If there had been no execution at all the title of the bill of sale holder would under the circumstances have prevailed against that of the trustee in the bankruptcy. If the execution had been valid it would have prevailed against the bill of sale holder. But the bankruptcy defeats the execution, and consequently the original right of the bill of sale holder prevails. I cannot think that such a result was intended by the Legislature as the bill of sale holder in fact obtains an advantage by the bankruptcy of his grantor.

LINDLEY, L.J.:—

I think the conclusion to which we have come is right, though at first sight it seems to be a little startling and paradoxical. Perhaps now the question is not one of much importance, except to the parties to this appeal. We have not only to construe sect. 8, but we have also to consider the effect of the doctrine of relation back in bankruptcy. Now, looking only at the language of sect. 8, what does it mean? I think it means what it says. I think it means that the execution creditor is to be satisfied in priority to the holder of an unregistered bill of sale who has not taken possession. "Fraudulent and void as against the execution creditor" does not mean void to all intents and purposes, but void only so far as is necessary to satisfy the claim of the execution creditor. Why the language of the clause has been altered I do not know, but it must have been altered to effect some object. By reason of the difference in the language we are relieved from any difficulty created by *Richards* v. *James* (1). Then by the relation back of the trustee's title the execution is swept out of the way. It is gone for all purposes; and the curious result follows that the holder of an unregistered bill of sale will benefit by the bankruptcy of the grantor. The moment the execution is gone, the question is reduced to one between the

(1) Law Rep. 2 Q. B. 285.

trustee and the bill of sale holder and, as the latter took possession before the filing of the bankruptcy petition, sect. 8 does not affect his right. The result is a curious one, but I can see no other conclusion which is consistent with both sect. 8 and the doctrine of the relation back of the trustee's title.

C. A. 1883 *Ex parte* Blaiberg. *In re* Toomer.

Appeal allowed with costs.

Solicitor for Appellant: *R. J. Jackson.*
Solicitor for Trustee: *H. T. Tiddeman.*

W. L. C.

Ex parte BROOKS. *In re* FOWLER.

C. A. 1883 C. J. B. *Jan.* 15. C. A. *March* 8.

Reputed Ownership—Order and Disposition—Furniture—Custom of Hiring—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 15, *sub-s.* 5.

The fact that it is the custom of furniture dealers to let out furniture on a three years hiring and purchase agreement does not disentitle the general public to assume that an ordinary householder is the real owner of the furniture which is in his house.

The furniture in the dwelling-house of a trader having been seized under an execution, a friend of his bought it from the sheriff at a valuation, and then verbally agreed that the debtor should continue in possession of it and use it as before, paying, by way of rent, interest at 5 per cent. per annum on the purchase-money, until he should be able to repurchase it at the price given for it. This arrangement was carried out, and the debtor remained in possession of the furniture as before, until he filed a liquidation petition. He had not repurchased it. The trustee in the liquidation claimed it under the reputed ownership clause. It was admitted that there is a custom for furniture dealers to let out furniture on a three years' hiring and purchase agreement, but there was no other evidence as to the existence of any custom of hiring furniture:—

Held (by *Bacon*, V.C., and by the Court of Appeal), that the trustee was entitled to the furniture.

On the 27th of March, 1877, the furniture and other effects of *William Fowler*, an engineer and boiler maker at *Hull*, were seized by the sheriff under a writ of *fi. fa.* On the 12th of April, 1877, *R. L. Brooks*, a draper, who was a friend of *Fowler*, bought the goods which had been seized from the sheriff at a valuation for £194 15*s.* *Brooks* then agreed with *Fowler* that he should remain in possession of the goods, until he should be able to repurchase

C. A. 1883 *Ex parte* BROOKS. *In re* FOWLER.

them, when he should be at liberty to do so for the sum which *Brooks* had given for them, and in the meantime the goods were not to be removed from *Fowler's* house, and he was to pay *Brooks* interest at the rate of 5 per cent. per annum on the sum he had given for the goods by way of rent for the use of them. This was a merely verbal agreement. It was carried out, and the goods remained accordingly in *Fowler's* possession. In 1879 *Fowler* filed a liquidation petition in the *Hull* County Court, and, on the 4th of June, 1879, a trustee was appointed. The trustee claimed the goods which *Brooks* had bought, as being in the order and disposition of the debtor as reputed owner with the consent of the true owner. There was no evidence as to any custom of hiring furniture, but it was admitted by the trustee that there was a custom for furniture dealers to let out furniture on a three years' hiring and purchase agreement.

The Registrar of the County Court, acting as Judge, held that *Brooks* was entitled to the goods. The trustee appealed to the Chief Judge.

The appeal was heard on the 15th of January, 1883.

Winslow, Q.C., and *J. Theodore Dodd*, for the Appellant :—

The order can be supported only on the ground that the order and disposition clause is excluded, in consequence of the existence of a custom to let and hire furniture. But that ground is disposed of by *Ex parte Lovering* (1), which has never been overruled or disturbed. The debtor here was neither a furniture dealer nor an hotel keeper; he was an engineer and boiler maker.

Cooper Willis, Q.C., for the Respondent *Brooks* :—

Any right to these goods which the trustee might have had in April, 1879, he has lost by his *laches* in allowing the debtor to remain in undisturbed possession until June, 1882.

Because no custom was proved in *Ex parte Lovering* therefore the Court is asked to assume that no custom exists here. Each case must turn on its own facts. In *Emerson* v. *Barnett* (2), in this branch of the Court, it was held that furniture hired by a bankrupt, who was a builder, was never in his order and disposition, and that he

(1) Law Rep. 9 Ch. 621. (2) 41 L. J. (Bkcy.) 20; 20 W. R. 110.

could not without fraud have treated it as his own. In *Ex parte Powell* (1) existence of a custom was proved though upon slight evidence, such evidence being uncontradicted; and again in *Crawcour* v. *Salter* (2).

In *Ex parte Saffery* (3) principles are discussed which are applicable to this case.

BACON, C.J.:—

On the law of the case I entertain no shadow of doubt. Reference to cases is wholly unnecessary. The law is now as plainly settled as it was when the Statute of *James* I. was passed. The question of order and disposition is and always has been a question for the jury. If there is no jury, the Court must exercise the functions of a jury and must decide upon the facts. The question is whether the chattels in question were within the order and disposition of the debtor with the consent of the true owner. Not only *Ex parte Lovering* (4), but *Lingard* v. *Messiter* (5), and many other cases, have established the principle to be—that if the owner suffers the debtor to remain in possession and to be the ostensible owner of the goods, they pass in case of bankruptcy to the trustee for distribution amongst the creditors, and there is no case that is at variance with that. What has been argued is, that some change has come over the law in recent years. Assuming that any change has taken place, it is this. It is notorious that there are persons who get their living by letting out furniture, and that it is the custom for those who have not ready money to pay for furniture, to hire furniture from these brokers, paying them a rent for it. The thing is commonly practised by hotel keepers and others; and no one can doubt that when the custom is established, and the possession, such as it is, is in accordance with the custom and proved by the facts in the case, then the doctrine of order and disposition in its rigour does not apply. But that is not the least like this case. In this case a judgment was recovered and an execution issued. The debtor's goods were taken in execution; they were appraised, and I suppose from what I have heard,

(1) 1 Ch. D. 501.
(2) 18 Ch. D. 30.
(3) 16 Ch. D. 668.
(4) Law Rep. 9 Ch. 621.
(5) 1 B. & C. 308.

C. A. 1883 *Ex parte* BROOKS. *In re* FOWLER. C. J. B.

though not very distinctly, at a sum of £194 15*s*. At that price they were bought by the Respondent, and he paid that amount to the debtor. The goods became the property of the Respondent, but they were left in the order and disposition of the debtor, and so they remained from the 12th of April, 1877, to the 15th of April, 1879. No claim was made by the purchaser whoever he was, no interference was attempted with the possession by the debtor, but the debtor remained, after the execution, unquestionably to all outward inspection the owner of the goods. So that when he went into liquidation, I do not hesitate to say that, the goods, without reference to the price paid for them, such as they then were, subject to any alteration that might have taken place during the possession by the debtor, belonged to the trustee in the liquidation, and that consequently they belong to him now. That is the trustee's right, but that is the limit and extent of his right. The Respondent may have a claim to the sum of £194 15*s*.; but the trustee has a right notwithstanding that claim to have the chattels wherever he can find them sold by him and administered for the benefit of the creditors. As to the chattels themselves, I have no inventory and no proof that whatever existed in 1877 existed also in 1879, when the trustee's title accrued. As to what has been done with them since, or what is their present condition, I know nothing; but I do know that according to law the chattels in question, or such of them as were in the possession of the debtor at the time of the liquidation, now form part of his estate and belong to the trustee. There will be an inquiry, if necessary, as to the chattels and of what they consisted in April, 1879, and the Registrar's order must be discharged. The Appellant is entitled to the costs of the appeal, but I give no costs of the proceedings before the Registrar in 1882.

J. B. D.

From this decision *Brooks* appealed.

C. A. The appeal was heard on the 8th of March, 1883.

Cooper Willis, Q.C., for the Appellant:—

The possession of the goods was palpably changed by the

seizure by the sheriff: *Ex parte Saffery* (1). The course of decision on the reputed ownership clause has very much altered of late years: *Ex parte Watkins* (2). The custom of letting out furniture for hire is well established now, and no one is entitled to give credit to a man on the strength of the furniture which he has in his house: *Crawcour* v. *Salter* (3).

The custom is so well known that no one is entitled to assume that a man is the owner of the furniture in his house: *Ex parte Lovering* (4) is distinguishable.

Winslow, Q.C., and *Cyril Dodd*, for the trustee:—

It is not enough for the Appellant to shew a custom of letting furniture on hire. What he must shew is a custom for the owners of furniture to sell it and then to take it back at once from the purchaser on hire, the possession remaining unchanged. This is exactly what was done in *Ex parte Lovering*, and Lord Justice *James* held that the reputed ownership clause applied. If a man has once been the owner of furniture his ownership must be determined by some public act. The custom of hiring furniture has no application to a case in which a man was originally the owner of the furniture. From the date of *Lingard* v. *Messiter* (5) such a case as that has been distinguished from a case to which a trade custom applies.

Cooper Willis, in reply:—

The seizure by the sheriff operated as a public change of possession, and this distinguishes the present case from *Ex parte Lovering*.

Jessel, M.R.:—

I think this is one of the most hopeless appeals I have ever listened to. The suggestion is that a man living in a house of his own full of furniture is not to be taken to be the owner of the furniture. It is admitted that he was the owner of it at one time. It is suggested that the habits of English society have

(1) 16 Ch. D. 668.
(2) Law Rep. 8 Ch. 520.
(3) 18 Ch. D. 30.
(4) Law Rep. 9 Ch. 621.
(5) 1 B. & C. 308.

C. A. 1883 *Ex parte* BROOKS. *In re* FOWLER. Jessel, M.R.

become so changed by furniture dealers occasionally letting out furniture on a three years' hiring agreement that the public at large no longer attribute the ownership of furniture to the person who is in possession of it. That proposition strikes me as extravagant. It is not supported by any evidence; it is not in accordance with the old decisions, and it is not in accordance with my view of the law. I certainly should be surprised to hear that it is so common for a man to hire a whole house full of furniture that the public are not entitled to assume that a man is the owner of the furniture in his house.

BAGGALLAY, L.J.:—

I am of the same opinion. I go further, and say that, even if the custom which is relied on prevails in *Hull*, I should think the fact that the debtor originally owned the furniture takes the case out of *Crawcour* v. *Salter* (1), and brings it within *Ex parte Lovering* (2).

LINDLEY, L.J.:—

This is not a case of trade custom. It is simply an invitation to us to hold that furniture is not within the reputed ownership clause.

Solicitor for Appellant: *W. Eley*, agent for *E. Laverack, Hull.*

Solicitors for Trustee: *Collyer-Bristow & Co.*, agents for *Levett & Champney, Hull.*

(1) 18 Ch. D. 30. (2) Law Rep. 9 Ch. 621.

W. L. C.

In re FINCH.
FINCH *v.* FINCH

[1876. F. 115.]

C. A.
1882
KAY, J.
July 15.
C. A.
1883
March 9.

Administration—Claim against Estate of Deceased Person—Evidence—Evidence of Claimant—Corroboration.

The rule that a claim upon the estate of a deceased person cannot be maintained upon the unsupported testimony of the claimant applies to cases of alleged debt as well as to cases of alleged gift.

Per JESSEL, M.R.:—The rule is a rule of prudence rather than of law; and in an action tried by a jury it is the duty of the Judge to recommend the jury to disregard the unsupported evidence of the claimant; but if they should decline to do so, and should find for the claimant, *quære* if their verdict could be interfered with.

An English widow lady residing in *Paris* in a house which belonged to her for her separate use, married an English gentleman, and by the marriage settlement certain plate which formerly belonged to her first husband, was settled to her separate use. After the marriage, her husband having family plate of his own, sent it to his wife's house in *Paris*, and she then sent her own plate to her son by her first marriage. Upon the death of the husband his family plate, and also a marble bust of himself, was in his wife's house at *Paris*. In a suit for the administration of his estate his wife claimed the plate as having been given her in exchange for her own plate, and the bust as having been presented to her by her husband:—

Held (reversing the decision of *Kay*, J.), that the surrounding circumstances did not furnish corroborative evidence in support of the claim by the wife to the plate and bust, and that as the claim rested on her unsupported testimony it could not be allowed.

THIS action was brought for the administration of the estate of *Charles Wynne Finch*, who died in 1874, having by his will dated the 22nd of June, 1872, appointed his wife, the Defendant, his sole executrix, and bequeathed his residuary personal estate to the Plaintiff.

The testator was a domiciled Englishman, and his residence was at *Voelas*, in *Wales*, but he lived part of the year in a house belonging to his wife, the Defendant, at *Paris*.

An inquiry having been directed as to the testator's personal estate, the Defendant claimed as her own property certain articles of plate bearing the testator's crest which were kept in the house

C. A. 1883 — *In re* FINCH. FINCH *v.* FINCH.

in *Paris*, which she alleged belonged to her for her separate use; and also marble busts of the testator and herself, which she said had been given to her by the testator before his death.

In support of her claim to the plate the Defendant deposed when examined before the examiner that the plate in *Paris* was her own; that she had some plate before her marriage, and that she gave it as a present to her son by her former husband, when the testator gave her the plate now claimed in its stead. That was when the testator succeeded to the plate from his father, two or three years after her marriage. The crest on it was the crest of the testator's family. She also stated that the busts were a present to her and were made for her.

The Defendant afterwards made an affidavit containing the further explanation that before she was married to the testator she was absolutely entitled to certain articles of plate bearing the crest of the first husband, Mr. *Lestrange*, and that by the settlement made on the marriage with the testator it was declared that the jewellery, plate, and other personal chattels to which she was then absolutely entitled should be held on trust that during the joint lives of herself and her husband the same should be used, enjoyed, or given in exchange or otherwise disposed of by her in manner therein mentioned, and after his death in trust for herself absolutely; and that before her marriage with the testator the testator proposed to take from her the plate with the *Lestrange* crest in exchange for other plate of like amount and value, bearing his own crest; and that this exchange was carried into effect shortly after the marriage, the plate so given and taken in exchange being equivalent piece for piece in fashion and value. And she said in a further affidavit that she sent the plate to her son at the request of the testator as a present from him and not from herself. As to the busts, the Defendant stated that they were ordered by the testator before her marriage from an artist at *Rome* as a present for her; but they were not completed till after her marriage, and were then delivered at her house in *Paris*, where they had remained ever since.

The Chief Clerk having found that the plate in *Paris* and the busts belonged to the Defendant, Mrs. *Wynne Finch*, a summons was taken out to vary the certificate, which was adjourned into

Court. The summons was heard before Mr. Justice *Kay* on the 15th of July, 1882.

R. J. Cust, for the Plaintiff.

Robinson, Q.C., and *F. Pollock*, for the Defendant.

KAY, J., after referring to the evidence in respect of the plate, said:—

It is said that the rule is that nobody can establish a gift from husband to wife upon the mere uncorroborated testimony of the wife after the death of the husband. That is a rule which I certainly acknowledge and desire to observe. But this case does not come within that rule, because it is not a case of gift at all, but a case of exchange and of exchange for ample value. In the second place, if it were a case of gift, I should think the corroboration which is derived from the evidence, not merely on oath, but the evidence of the facts, the actual disposition of the lady's own plate, and the substitution in her own house, which she held for her separate use, of other plate of the exact equivalent in value, which has remained there ever since, would be a sufficient corroboration even of a gift. But this is not the case of a gift at all—the claim of the Plaintiff is neither more nor less on the evidence before me than this. Of course the Plaintiff cannot put the case higher than the testator himself could have put it. Suppose the testator had made this claim, "I have sanctioned the gift of this plate which belonged to you for your separate use, to your son by your first marriage, upon the terms that I should replace it in your house by other plate equivalent to it of my own; you, on the faith of that being done, have given away your plate, and now I claim back the plate I have given in exchange." That would be, if the testator made it, a claim which could not be supported for a moment, and it would be a most dishonest claim. I think the case is completely made out, and I think the rule which has been insisted on does not strike at the case in any way, and without infringing that rule in the slightest degree, I hold that the widow is entitled for her separate use to the plate so taken in exchange.

Now there remains the other question as to certain busts.

C. A. 1883 *In re* FINCH. FINCH *v.* FINCH. Kay, J.

There are busts of the Defendant and her husband, and the evidence before me is this, that they were ordered by the husband at *Rome* for her, were sent to her house in *Paris*, and have been there ever since as part of the decoration and ornament of that house. And I am told again that the Court is powerless to allow her to retain these busts, because there is no corroborative evidence. But surely if an article intended as and calculated to be part of the decoration of a house, is ordered by a husband for his wife, as part of the decoration of a house belonging to her for her separate use, is used for that purpose from the moment of its construction, and has been in it ever since, that is corroborative evidence. At any rate, I shall so decide. Supposing it had been a mirror fitted on to the wall of that house, or any other article of decoration, as a picture, which had been ordered to be painted in order to be hung in that lady's house, I should say, if the article so alleged to have been ordered and made expressly for the wife had been used from the time it was delivered as an article of ornament or decoration for a house which belonged to her for her separate use, that would be quite sufficient corroboration of her evidence that the article had been given to her by her husband for her separate use. I therefore think that she is entitled to those two busts.

From this decision, except as to the bust of the lady, the Plaintiff appealed. The appeal was heard on the 9th of March, 1883.

R. J. Cust (*Davey*, Q.C., with him), for the Appellant:—

The Court will not act upon the unsupported testimony of a claimant against the estate of a deceased person whether in respect of an alleged gift or an alleged debt: *Grant* v. *Grant* (1). Here there is no corroboration either as to the plate or the busts.

With respect to the plate the Defendant relies on the power she had of exchanging the *Lestrange* plate, but there was no exchange in this case; the husband never received the *Lestrange* plate; the lady gave it away herself to her son.

[He was stopped by the Court.]

(1) 34 Beav. 623.

Robinson, Q.C., and *F. Pollock*, for the Defendant:—

The plate was taken in exchange for the *Lestrange* plate. It was valued and exchanged piece by piece. The gift of the *Lestrange* plate to the Defendant's son was part of the arrangement, and was the same as if the husband had given it himself.

With respect to the testator's bust it was ordered for the lady, and the fact that it remained always in her house as part of the decoration is sufficient corroboration of the gift. It is not necessary to support a gift by a husband to a wife that any particular words should be used, if the conduct of the parties shews their intention.

JESSEL, M.R.:—

In this case I must say that I entirely differ from the learned Judge both as to his conclusions as to the facts and as to the law.

In the first place, I cannot find that anybody ever laid down the law or the doctrine that the rule that a claim against a dead man's estate should be supported by something more than the uncorroborated testimony of the claimant is confined to gifts. It is the first time I have ever heard of such a doctrine as this. I have heard it decided over and over again in reference to the payment of a debt, and it is a rule of prudence that, sitting as a jury, we do not give credence to the unsupported testimony of the claimant, with a view, no doubt, of preventing perjury, and with a view of protecting a dead man's estate from unfounded claims. It is not a rule of law, but it is a question to be decided by a jury, although the Judge must recommend the jury not to trust the uncorroborated evidence; but still if they did I do not know that any one could interfere with their verdict. But where we are sitting here as a jury we apply that rule to ourselves. That is the first point.

Now, in the next place, I must say that I differ with the learned Judge as to his notion of gifts. The story told here is simply this; that the testator gave away his plate—the claimant does not say when or how—and denuded himself of his property in the plate to enable his wife to give an equivalent quantity of plate to her son. It was not a bargain, as I understand it, that he should get anything, but a bargain that he would give her as much as she

C. A. 1883 *In re* FINCH. FINCH *v.* FINCH. Jessel, M.R.

gave to her son. I suppose that is a gift, and I suppose all mankind would so regard it. He receives nothing; that is not material in this case, but that is how I should view it if I had to criticise the transaction so far as regards the plate.

Now I come to the next point, which is this. Was there any corroboration? As I understand, corroboration is some testimony proving a material point in the testimony which is to be corroborated. It must not be testimony corroborating something else —something not material. Now the suggestion as to corroboration is something of the most singular character. The corroboration is this. The lady says her husband gave her a bust or some plate. It does not matter which branch of the case we take, or which it is that is to be corroborated. There is no direct evidence of the gift except this lady's own testimony.

But then it is said that the bust or the plate was found in a house which belonged to her for her separate use; but the house was a house in which her husband resided with her for some months in every year. This lady having been a widow, and having a house in *Paris*, when she marries this gentleman settled all her property to her separate use. When they resided together in *Paris* they resided together in her house; when they resided together in *Wales* they resided in his house; but it was his home as much when he was in *Paris* as it was in *Wales*. The property in the house was in a different member of the married couple, but it was his home, and where should he put his property except in the home that he had? If he had plate or if he had pictures, or if he had statues or if he had books, or if he had guns or pistols, or if he had anything else: if he had even peculiar furniture, such as an easy chair, where was he to put it except where he could use it in the place where he resided? How is that a corroboration of her story that he had parted with his property? To my mind it is totally unintelligible. I hope I am not using a disrespectful term, but I cannot understand at all how that corroborates her statement that it was given to her. It is absolutely without corroboration.

That alone would be sufficient to dispose of this case, but I must say that there are points in the case to which the attention of the learned Judge does not appear to have been directed,

C. A.
1883
In re
FINCH.
FINCH
v.
FINCH.
Jessel, M.R.

which seem to me to be very much in the opposite direction. In the first place, take her story about this plate. I am not imputing anything to this lady, except, perhaps, a little want of memory. She says this, that there was an arrangement made that she was to have the plate in exchange for the *Lestrange* plate, that that arrangement was made before the marriage, and that in consequence of that arrangement having been come to, there was a special power of exchange inserted in the marriage settlement.

Now that matter we can test for ourselves. We have got the marriage settlement, and there is no special power of exchange in it. There are words which an attorney's clerk might have thought were sufficient, but they are not. It is the old common form of settling property to the separate use of the lady, and nothing more. No doubt the word "exchange" is there, but when you read it you find it is in these words—it is an old form and is full of redundancy: "To have and to hold the said premises lastly hereinbefore expressed, to be hereby assigned unto the said [trustees], nevertheless upon and for the trusts, intents, and purposes following (that is to say), In trust for the said *J. J. E. Lestrange*, her executors and administrators, until the said intended marriage, and after the solemnization thereof in trust, during the joint lives of the husband and wife, to permit the same premises to be used and enjoyed, or given or exchanged, or otherwise disposed of by the said *J. J. E. Lestrange*, from hand to hand, or by deed or by writing, or by will or codicil, as her separate estate, independently of the said *C. Wynne Finch*, and of his debts, control, or engagements." As I said before, it is only a settlement on herself.

Then again, when she gives her testimony as to this very curious transaction as to the *Lestrange* plate, what she says in her deposition, when she is examined in the box, is, that she sent the plate as a present to her son. She afterwards makes an affidavit, and says that that is wrong and is altogether a mistake—that is the sort of statement we have to deal with—whereas the real facts were that she exchanged it with her husband, upon an agreement with him that he should send it as a present to her son.

The only observation one can make is, that the first story—

C. A.
1883
In re FINCH.
FINCH *v.* FINCH.
Jessel, M.R.

namely that the husband said, "Now that my father is dead, and I have plenty of plate of my own, I do not care about using the plate of your former husband, with his crest upon it; send it away"—is a very natural and perfectly intelligible story; but the story that it was to be sent by her husband as a present to her son is very singular. Both stories cannot be right; and, as she made one statement at one time and another statement at another time, it does appear to me that her memory is not quite reliable; and upon both points, therefore, we have reason to distrust her memory.

Again, I must say the story about the bust is not very definite, it is very hazy indeed. I have no doubt the lady thinks she ought to have that bust, and that she thinks it was intended as a present to her, but she does not say that any words of donation were used. She cannot point to a place, or to a time, or to anything which would amount in law to an ordinary donation, if there could be such a thing at that time.

As to that, what the learned Judge in the Court below treated as corroboration was this, and nothing more, that the bust of the gentleman, as well as the bust of his wife, was in the house which belonged to the lady. Where should the busts have been? They must have been in one of the houses inhabited by this gentleman; and, if he liked to see his bust in *Paris*, how does it afford any evidence that he had given the bust to his wife? I do not see the slightest corroboration of the most material point, which must be corroborated if the Defendant is to succeed.

It does not appear to me that there is sufficient evidence as to the gift, or any evidence of corroboration. Therefore, as to all the property in question the Appellant is, in my opinion, entitled to succeed.

BAGGALLAY, L.J.:—

The circumstances of this case appear to me to afford a very good illustration of the value of the rule recognised by our Courts in administering the estate of a deceased person, namely, not to allow against that estate any claim which is supported only by the parol testimony of the claimant, without any corroborative evidence whatever.

C. A
1883
In re
FINCH.
FINCH
v.
FINCH.
Baggallay, L.J.

In the present case the claimant was a widow at the time she married Mr. *Wynne Finch*, the testator, and she was possessed of a house, or of part of a house, in *Paris*, with furniture in it, including some plate which bore the crest of her former husband, Mr. *Lestrange*. At the time of her marriage with Mr. *Wynne Finch*, with whose estate we are now dealing, her property was settled to her separate use. I should state that the gentleman whom she married, Mr. *Wynne Finch*, was not at that time a householder himself, although he had expectations from his father, and he was not then possessed of any furniture or plate at all. He resided at the house which his wife had in *Paris*, and there he had the use of her furniture and plate. Two years after the marriage his father died, and he then became possessed of an estate in *Wales*, and, amongst other things, of a considerable quantity of plate. Thereupon the *Lestrange* plate, which was in the house of this lady in *Paris*, was sent to her son, and an equivalent quantity of plate belonging to Mr. *Wynne Finch* was sent over to *Paris*. That is the undisputed state of the case.

Now the lady's first account of this transaction was, that the plate was sent by her to her son, or to a banker for her son, who was at that time absent from this country. It was perfectly consistent with the circumstances and probabilities of the case that the plate belonging to herself should go to her son, when her husband was in a position to find a proper amount of plate for their own use; but, after making her deposition to that effect, the Defendant was advised to put in an affidavit, in which she qualified or corrected her statement that she had given the plate to the son, by making a statement that, before the marriage, an agreement was come to between herself and her husband that the plate should be exchanged, piece by piece, and that Mr. *Wynne Finch* should take the *Lestrange* plate and make a present of it to her son. That is a very improbable story; and the more improbable when we bear in mind what she had said in the first instance.

I do not for a moment suppose that this lady intended to make any statement which was contrary to her real belief. It is possible that, at the time she made this second statement, although she was forgetful as to other matters, she was under the

C. A. 1883 *In re* FINCH. FINCH *v.* FINCH. Baggallay, L.J.

impression that such an arrangement was come to as that which was introduced into the affidavit which she made. But an improbable story of that sort particularly requires corroborative evidence, and I cannot find the slightest trace of corroboration in this case.

Then when we come to the case of the bust, it seems to me that there is just as much improbability about it as there is about the plate. It is much more probable that a father, the head of a family, who had had a bust of himself executed, should desire that, after his death, or after the decease of his widow, who was his second wife, the bust should go to his own immediate descendants, than that it should be in the disposition of the second wife. The contention here is that the bust of himself, he leaving a family of his own behind him, is to go to his second wife, and that she can dispose of it as she thinks fit.

Again I say that is an improbable story. It would have been a reasonable disposition if he had given her the bust for her life, and had said that it should then go back to his own family. But that is not the contention. And where do we find any corroboration of this story about the bust? There is none whatever, except that which has been referred to two or three times, that when the bust was finished it was sent to her house in *Paris*. But that is where he was residing and continued to reside, and so it remained there.

The Defendant might just as well have contended that every article he had must be treated as given to her, simply because it was sent to the house in *Paris*, where they were both residing. If we were to dispense with corroborative evidence, and adopt the account given to us by this lady, we should be certainly departing from that which I have always considered to be the general rule with regard to cases of this kind.

LINDLEY, L.J.:—

I am also of opinion that this appeal must be allowed. This is a claim made by a living person against the estate of a person who is dead. It is the rule—and it is a sensible rule—to require before giving weight to the testimony of that living claimant that such testimony should be corroborated in some way or other.

If this case had been tried before a jury, and the jury had found in favour of the claimant, I am not prepared to say that there would have been any principle of law to enable us to set aside the verdict; but where we have not had the advantage of having twelve men in the box, the ordinary practice of the Court is to be very reluctant to give effect to the uncorroborated statement of anybody, as against the estate of a deceased person. It has been said in this case that the learned Judge in the Court below appeared to have taken the view that there was corroborative evidence; and therefore it becomes important to look into that. As regards the plate, and as regards the bust, the corroborative evidence relied upon appears to be substantially the same, that is to say, that they were both sent to the house of the lady in *Paris*, which house was settled to her separate use. Now, before that can be regarded as corroborative evidence, we must look at it in order to see what it corroborates. It is undoubtedly consistent with the lady's story; that is plain enough. But it seems to me to be equally consistent with another view altogether; and evidence which is consistent with two views does not seem to me to be corroborative of either. It is not inconsistent with the view taken by the residuary legatee, although it is consistent with the view taken by the lady. Her statement appears to me to be uncorroborated for the purposes of this case. I am also struck very much by her affidavit. I think, as has been said before, that traces of skill can be seen in it. I distrust the story myself, without imputing anything to this lady except a conviction in her own mind that these things are hers. I do not distrust the lady, but I distrust her affidavit; and, upon the ground that her evidence stands alone, and without any corroboration, I think that this appeal ought to be allowed and with costs.

Solicitors for Appellant: *Nicholl, Manisty, & Co.*
Solicitor for Defendant: *A. F. Coe.*

M. W.

C. A.
1883
March 16.

DUTTON *v.* THOMPSON.

[1882 D. 3476.]

Voluntary Settlement—Grounds for setting aside—Improper Clauses—Trustee—Appeal for Costs.

Where an action is brought by the settlor against the trustees to set aside a voluntary settlement, the Court will not consider the propriety or impropriety of the clauses, except as evidence that the settlor did not understand what he was doing; the only question being whether the settlor understood what he was doing and its effect on his position with regard to the property.

Per Cotton, L.J.:—But *quære* whether this applies to cases in which there are persons claiming adversely to the settlor.

Where a settlement is set aside the trustee has no claim to his costs as a matter of right, there being no contract in existence; and, therefore, if costs are given against him he has no right of appeal.

J. THOMPSON, by his will, dated the 13th of February, 1867, gave his residuary real and personal estate to four trustees, of whom the Defendant, *John Thompson*, was one, upon trust to convert the same into money, and to hold the proceeds in trust for his wife for life, and after her death to divide the same into nine equal parts, one of which shares he gave to the children of his deceased daughter, *Sarah Dutton*, in equal shares. And the testator provided that the trustees should have power to withhold the portions bequeathed to the children of *Sarah Dutton* till they respectively attained the age of twenty-five years. The testator died in June, 1867. The Plaintiff, *C. E. Dutton*, was one of the three children of *Sarah Dutton*, and so became entitled to one twenty-seventh part of the residuary estate.

The Plaintiff attained his age of twenty-five years on the 25th of January, 1882.

The Defendant, *John Thompson*, considering that the Plaintiff, who was his nephew, was a young man of improvident habits, prepared a voluntary settlement for his execution, after consulting the Plaintiff's father and step-mother. This settlement was first tendered to the Plaintiff for execution in the month of July, 1879, but he then refused to execute it; but subsequently,

in July, 1881, he was persuaded by the Defendant to do so. The settlement bore date the 2nd of July, 1881, and was expressed to be made between the Plaintiff of the one part and the Defendants *John Thompson* and *John William Thompson* of the other part, and the Plaintiff thereby assigned all his interest in the residuary estate of the testator, *John Thompson*, to the Defendants *John Thompson* and *J. W. Thompson* upon trust to invest the same and to hold the investments in trust for such persons and for such estates and generally in such manner as the Plaintiff should, with the consent of the said trustees, by any deed appoint (the granting of such consent to be in the absolute discretion of the said trustees), and subject to such power of appointment in trust to pay the income to the Plaintiff during his life, and after his death to his children and issue as therein mentioned, and in default of such issue in trust for the Plaintiff's stepmother if then living, and if she should be dead, then in trust for the Plaintiff's next of kin according to the *Statute of Distributions*.

The father and stepmother of the Plaintiff disclaimed all interest under the settlement.

J. W. Thompson did not execute the settlement or accept the trusts.

On the 30th of March, 1882, the Plaintiff commenced the present action in the Chancery Court of the Duchy of *Lancaster* against the Defendant *John Thompson* and the Plaintiff's father and stepmother claiming that the settlement should be set aside and cancelled on the grounds that his signature to the settlement had been procured by undue influence, that he did not understand the effect of it, and that he had no independent legal advice.

The Defendant *John Thompson* in his defence stated that the Plaintiff was of improvident habits and was in the receipt of weekly wages only, and was not, in the Defendant's opinion, likely to be successful in any business or profession, and the Defendant was therefore desirous, in furtherance of the expressed wishes of his father and stepmother, that he should make a settlement of the property devolving upon him under the will of the testator. The Defendant also stated that he had no object in view

C. A. 1883 DUTTON v. THOMPSON.

but the benefit of the Plaintiff, and he denied that any undue influence had been used, or that the Plaintiff did not understand the effect of the deed.

At the trial the Plaintiff swore that before the settlement was tendered to him in 1879 he had heard nothing about it, that he did not know the amount of the property coming to him under the will; that when he signed the deed in 1881 he did not understand the effect of it on his position with respect to the property; that he believed that under his grandfather's will he had no power of drawing the capital, and that he did not know his rights under the will till after he had signed the settlement. The Plaintiff had no independent legal advice at the time when he executed the settlement.

On the other hand the Defendant swore that the settlement was read over to the Plaintiff and explained to him when it was tendered to him in 1879, and also in July, 1881, when he executed it.

Under these circumstances Mr. *H. F. Bristowe*, the Vice-Chancellor of the Duchy of *Lancaster*, gave judgment to set aside the settlement and ordered the Defendant *John Thompson* to pay the Plaintiff's costs.

From this judgment the Defendant appealed.

Kekewich, Q.C., and *Clare*, for the Appellant:—

The settlement is a reasonable one considering the disposition and circumstances of the Plaintiff; but whatever the provisions are it must be upheld if the Plaintiff understood what he was doing when he executed it: *Phillips* v. *Mullings* (1). The evidence shews that the Plaintiff did understand the effect of the settlement. The matter was put fairly before him both in 1879, when he refused to execute the settlement, and in 1881, and it was read over and explained to him on both occasions.

If the settlement is set aside, the order making the Defendant pay the costs is erroneous. The Defendant acted throughout for the benefit of the Plaintiff, and is entitled to his costs as trustee. No improper conduct being proved against him his right to the costs is a matter of contract, and is not within the discretion of

(1) Law Rep. 7 Ch. 244.

the Judge. The Defendant is therefore entitled to appeal on that ground: *Everitt* v. *Everitt* (1); *Turner* v. *Hancock* (2).

Rigby, Q.C., and *Pankhurst*, for the Plaintiff, were not called upon.

JESSEL, M.R.:—

This appeal involves two points. First, whether the deed which is impeached can stand, and whether consequently the trustee can succeed on that ground; and secondly, whether if the deed is set aside the trustee can appeal against the order of the Court that he should pay the costs. As to the first point, I think that the deed cannot stand, on the ground alleged in the statement of claim, namely, that the Plaintiff did not understand it. I emphatically disagree with the ground on which some Judges have set aside voluntary settlements, namely, that there were provisions in them which were not proper to be inserted in such settlements. It is not the province of a Court of justice to decide on what terms or conditions a man of competent understanding may choose to dispose of his property. If he thoroughly understands what he is about, it is not the duty of a Court of justice to set aside a settlement which he chooses to execute on the ground that it contains clauses which are not proper. No doubt if the settlement were shewn to contain provisions so absurd and improvident that no reasonable person would have consented to them, or if provisions were omitted that no reasonable person would have allowed to be omitted, that is an argument that he did not understand the settlement. But in no other way would it be a reason for setting it aside. In this case I cannot avoid seeing that the Defendant acted throughout for what he considered to be for the benefit of the Plaintiff, and, so far as I am concerned, I should not have ordered him to pay the costs of the action. But the question we have before us is not whether the Defendant's motives were good or bad, but whether the Plaintiff understood the deed. The evidence convinces me that every one thought the Plaintiff was very weak minded. I do not mean to say that

(1) Law Rep. 10 Eq. 405. (2) 20 Ch. D. 303.

C. A. 1883 DUTTON v. THOMPSON. Jessel, M.R.

they thought he was sufficiently so to make him a lunatic, but they thought he had not that full enjoyment of his faculties which average persons have. That is quite plain to me from the evidence. He was a man of full age, he had been employed as a merchant's clerk, but you cannot read the evidence without seeing that in the whole transaction they treated him as a baby, and not as a man of average intellect. It is clear that having that opinion the Defendant ought to have taken unusual precautions to guard the settlement from any suspicion.

Now when we look at the evidence on the point which was given by the Plaintiff in the witness-box, although he admitted that he understood the settlement to some extent, it is clear from his answers that there was much that he did not understand, and in particular he did not know the amount of the property to be settled. In my opinion there was a special obligation on the part of the Defendant to see that the Plaintiff understood the settlement, which obligation he has not discharged.

People who prepare settlements for their nephews must shew clearly that their nephews understood them when they executed them. In the case of this settlement I am clearly of opinion that the Plaintiff did not understand half of it. Therefore the judgment of the Vice-Chancellor as to setting aside the settlement is right.

With respect to the costs, I should not have made this good-natured uncle pay the costs; but the Vice-Chancellor had a discretion, and though the Defendant has received hard measure I cannot see how he can have any appeal from the Vice-Chancellor's discretion. He has appealed from the whole of the judgment, and he cannot, according to the practice of the Court, obtain a reversal of the order as to costs unless he succeeds in varying the judgment in a material part.

It is said that the Defendant can appeal as to the costs on the ground that he is a trustee. But he is only a trustee if the deed is established: he is not a trustee if the deed is set aside. There is no contract in existence under which he can claim his costs as of right. I regret it, but I can come to no other conclusion than that the appeal must be altogether dismissed.

COTTON, L.J. :—

This is an appeal from a judgment of the Vice-Chancellor of the Duchy of *Lancaster* ordering the deed to be set aside, and the Defendant to pay the Plaintiff's costs of the action.

It was admitted that the object of the Defendant in appealing against the whole judgment is to get the order reversed as to the payment of costs. He has a right to do this; but he further contends that even if he should not succeed in reversing the order to set aside the settlement we could still entertain the question whether or not he should have been ordered to pay the costs. The Appellant is trustee of this settlement. No doubt a trustee is entitled to costs of an action which is brought for the administration of the trusts. But this claim is adverse to the settlement, and the Plaintiff does not claim under the settlement but against it. Therefore this rule has no application. I must say for myself that I see no ground for imputing unworthy motives to the Defendant in getting this settlement executed, or in procuring the insertion of any particular provisions. But if he is in the wrong, and the settlement is set aside, we cannot properly interfere with the order of the Judge as to costs. It is a matter within the discretion of the Vice-Chancellor.

Then we come to the question whether the judgment of the Vice-Chancellor setting aside the settlement can be disturbed. In my opinion it cannot. Many cases where settlements have been impeached have turned upon the question whether they contained proper clauses having regard to the position of the settlor. Where the contest is between the settlor and persons claiming adversely to him different considerations apply, and it may be right to consider that question. But where the claim, as here, is against the trustees of the settlement, and not against any other persons, we ought not, in my opinion, to go into the question whether the provisions inserted were proper, but only whether the settlor really understood the settlement which he executed. This is the question in this case. I do not mean only whether he read it over, but did he know how his position under his grandfather's will would be affected by it? If he did

C. A. 1883 DUTTON v. THOMPSON.

not I cannot doubt that it is the duty of this Court to relieve him from it. On considering the whole of the evidence I cannot come to any other conclusion than that the Plaintiff did not understand the settlement, and therefore the appeal must fail.

LINDLEY, L.J. :—

I am of the same opinion. I have attended closely to the evidence, and my conclusion is that the Plaintiff did not understand the settlement. It was no doubt read over to him, but it was not fully explained to him. I cannot help coming to the conclusion that he did not realize the effect of the settlement on the interest which he took under the will. I do not think he knew the amount settled, nor the extent to which he was put under the power of the trustee, nor that the property would eventually go to his step-mother. In my opinion it is impossible that this deed can stand.

As to the costs, I believe that the Defendant thought he was doing the best for his nephew; but still it was by him and the Plaintiff's step-mother that the whole thing was brought about. At all events, the costs were in the Judge's discretion, and we cannot interfere with his order.

Solicitors: *Woodall & Marriott, Manchester; Gregory, Rowcliffes, & Co.*, agents for *J. W. Thompson, Liverpool.*

M. W.

ROBINSON *v.* OMMANNEY.

C. A. 1883 March 17.

[1882 R. 626.]

Covenant not to revoke Will—Restraint of Marriage—Contingent Liability—Proof in Bankruptcy—Covenant ancillary to Mortgage—Discharge.

An unmarried woman, having a power of appointing a sum of money by will, made a will appointing it to a mortgagee, and covenanted not to revoke the will. She afterwards became bankrupt and obtained her discharge. After her discharge she revoked her will, and made another appointing the sum of money to another person.

Held (affirming the decision of *Kay*, J.), first, that the covenant not to revoke the will was divisible, and was not wholly void, although in one alternative it was in restraint of marriage; secondly, that the contingent liability under the covenant was incapable of proof under the bankruptcy, that the covenant was not released by the bankruptcy, and that an action would lie for damages for a breach of the covenant committed after the bankruptcy.

THIS was an appeal from a judgment of Mr. Justice *Kay* (1).

The facts were shortly as follows:—

Under the will of *John Bohn* a sum of £1202 15*s.* 7*d.* Bank Annuities stood limited in trust for *Lydia Bohn* during her life, and after her death upon trust for such persons as she should by will appoint, and in default of appointment for her next of kin.

Lydia Bohn, being unmarried, executed a deed of mortgage on the 5th of February, 1859, whereby she assigned the dividends on the sum of £1202 15*s.* 7*d.* Bank Annuities during her life, together with a policy of insurance on her life, to *Henry Robinson*, as a security for money advanced by him, with interest at 10 per cent., and the deed contained a covenant by *Lydia Bohn* that she would forthwith duly make her last will in exercise of the power given to her by the will of *John Bohn*, and would by will appoint unto *H. Robinson*, his executors, administrators, and assigns, the principal sum of £1202 15*s.* 7*d.*, upon trust to pay thereout to him or them the principal money and interest for the time being due under the mortgage; and that she would not do or commit any act, deed, matter, or thing by means whereof the said will so to be made by her should be revoked, annulled, cancelled, or affected in any manner howsoever.

(1) 21 Ch. D. 780.

C. A. 1883

ROBINSON v. OMMANNEY.

Lydia Bohn made a will in accordance with her covenant, dated the 7th of February, 1859, and delivered it to *Robinson*.

She was adjudicated a bankrupt on the 10th of April, 1862, and obtained her discharge on the 4th of June, 1862.

On the 28th of August, 1876, *Lydia Bohn* made another will by which she gave her estate to her executors, one of whom was the Defendant *F. Ommanney;* and in exercise of the aforesaid power she appointed and bequeathed the said sum of £1202 15*s.* 7*d.* to her executors upon certain trusts, and revoked all previous wills made by her. She died on the 3rd of April, 1880, and the will was proved by the Defendant *Ommanney* alone.

The present action was brought by the executors of *H. Robinson* against the executor of *Lydia Bohn* claiming £710 8*s.* 9*d.*, which was the amount due for principal and interest under the mortgage, as damages for the breach of the covenant not to revoke the will of February, 1859.

The Defendant demurred to the statement of claim, and Mr. Justice *Kay* having overruled the demurrer, the Defendant appealed.

Cookson, Q.C., and *J. G. Wood*, for the Appellant:—

In the first place the covenant is void as against public policy, for a covenant not to revoke a will is in effect a covenant not to marry, which is one mode of revocation. The covenant is not divisible, and is therefore entirely void: *Price* v. *Green* (1).

Secondly, if the covenant is not void it was proveable in the bankruptcy, and is therefore now discharged. The covenant was auxiliary to the mortgage, and the debt being discharged the covenant falls with it: *Collyer* v. *Isaacs* (2); *Thompson* v. *Cohen* (3).

Cozens-Hardy, Q.C., and *Finch*, for the Plaintiffs, were not called on.

JESSEL, M.R.:—

There is nothing in this appeal. With regard to the first point, the covenant is, as was pointed out by Mr. Justice *Kay*, divisible. So far as it was in restraint of marriage it was bad; you could

(1) 16 M. & W. 346. (2) 19 Ch. D. 342.
(3) Law Rep. 7 Q. B. 527.

not of course bring an action for breach of the covenant by the marriage of the covenantor, but that does not destroy the covenant.

As to the second point; this is a covenant in a mortgage. The lady mortgages her life interest in the dividends, and then appoints the capital to the mortgagee by her will. That is a very good mortgage if the will is not revoked, and then she covenants not to revoke the will. It would have been just as good a covenant if there had been no debt from the covenantor; as for instance if there had been a suretyship. The covenant was ancillary, not to the debt, but to the mortgage. It is clear that there being no breach of covenant before the bankruptcy, the covenantee could not have proved in the bankruptcy. He could not prove for the possibility of a breach. Then why should not the executor of the bankrupt be now liable? I see no reason why the bankruptcy should destroy her liability under the covenant. I think that Mr. Justice *Kay* was quite right, and that this appeal must be dismissed with costs.

COTTON, L.J.:—

I am of the same opinion. The covenant was in a mortgage deed; there had been no breach of it before the bankruptcy, and it could not be estimated so as to make it proveable in the bankruptcy. That being so, and there being a breach after the bankruptcy, why should not this action be brought? I can see no reason. It is said that the covenant was ancillary to the debt, and that the debt being discharged the covenant is gone too. But it was not ancillary to the debt in any sense except in the sense that it is a covenant not to destroy the mortgage and is ancillary to the mortgage by which the debt is secured.

In my opinion the breach having been committed after the bankruptcy, this action is maintainable, and the appeal must be dismissed.

BOWEN, L.J.:—

I am of the same opinion.

Solicitors: *G. B. Wheeler; Sutton & Ommanney.*

M. W.

C. A.
1883
March 20.

In re PAYNE.
RANDLE *v.* PAYNE.

[1882 P. 2737.]

Practice—Staying Proceedings—Action by Married Woman—Next Friend—Costs in Former Action by a different Next Friend not paid.

An action was brought by a married woman by her next friend, and an order was made that the next friend should give security for costs on the ground of poverty. That order not having been complied with the action was dismissed with costs. Afterwards the Plaintiff by a different next friend brought another action for the same purpose:—

Held (reversing the decision of *Bacon*, V.C.), that the second action ought to be stayed till the costs of the first action were paid.

Hind v. *Whitmore* (1) not followed.

MRS. *RANDLE*, a married woman, brought an action in 1881 in the Court of Vice-Chancellor *Hall*, by *J. Rogers*, her next friend, against the executors of her father, *W. Payne*, for the administration of his personal estate. The Plaintiff also asked to enforce her equity to a settlement against her husband, who was joined as a Defendant.

In June, 1882, this action was dismissed with costs on account of the next friend not complying with an order to give security for costs; the order having been made on the ground that he was a person of no property.

In October, 1882, the same Plaintiff, by a different next friend, *C. H. Stokes*, brought another action against the same Defendants before Vice-Chancellor *Bacon*, asking substantially for the same relief.

The Defendants took out a summons to stay the proceedings until the costs of the first action, which had been taxed at about £80, had been paid.

The Vice-Chancellor having refused the application, the Defendants appealed.

Hadley, for the Appellants:—

It was the Plaintiff's duty to select a responsible next friend in

(1) 2 K. & J. 458.

the first action. In a proper case a married woman may get leave to sue without a next friend; but in such a case she would have to give security for costs. If the Plaintiff had not been a married woman this order would have been a matter of course.

C. H. Turner, for the Plaintiff:—

It will be impossible to find a next friend who will consent to become responsible for the costs of the first suit as well as the present. If this is required it will amount to a complete denial of justice. The rule that a Plaintiff must pay the costs of the first suit before he commences another for a similar object has never been applied to the next friend of a married woman. That is the ground on which the Vice-Chancellor refused the application. *Hind* v. *Whitmore* (1) is distinctly in our favour. At all events, it is a matter for the discretion of the Court: *Martano* v. *Mann* (2).

COTTON, L.J.:—

In this case unfortunately we have no note of the reasons upon which the Vice-Chancellor refused the application; we are told that he said that he did not think the ordinary rule of the Court which we are asked to enforce applied to the case of a next friend; but we do not know the exact grounds of his decision. There being no decision against the order asked for except *Hind* v. *Whitmore* I think that it is right that the order should be made. Different considerations apply to a suit by an infant. If an infant sues by a next friend and the suit is dismissed with costs, it would not be right to prevent him from bringing a new suit by another next friend on the ground that the costs of the former suit had not been paid. But a married woman has a power of selecting her next friend. She has to a certain extent a voice in the suit, and she is under an obligation to select a responsible person as next friend who may be answerable to the Defendant for costs if the suit should be dismissed. I see no reason why the same rule should not apply to her as to persons who sue without a next friend, namely, that if a suit is dismissed with costs the same plaintiff cannot proceed in

(1) 2 K. & J. 458. (2) 14 Ch. D. 419.

C. A. 1883 *In re* PAYNE. RANDLE *v.* PAYNE. Cotton, L.J.

another suit for the same objects until the costs of the first action have been paid. Undoubtedly it would have been hard upon the new next friend to order him to pay the costs of the first action personally. But that is not what is now asked for, but only that the second action may be stayed till the costs of the first have been paid by somebody or other. There is no case in point except *Hind* v. *Whitmore* (1), in which there is an expression of opinion by Vice-Chancellor *Wood* that the rule ought not to be extended to such a case as we have before us. But a married woman stands now on a different footing from that on which she stood at that time. She can sue without a next friend by leave of the Court under Order XVI., rule 8, with or without security for costs, as the Court may direct. Therefore it cannot be said that she is prevented from suing because she cannot find a next friend. We must, therefore, lay down the rule that a married woman cannot be allowed to bring a fresh action till the costs of the former suit are paid. She must take care to select a next friend who is a responsible person. If she does not do so she will be at this disadvantage, that if she fails in her suit she cannot bring a new one until the costs in the former are paid.

It is said that there is nothing to shew that the former next friend is not able to pay the costs of the old suit if applied to. If it could be shewn that he was able to pay the costs, and that the Defendants had taken no proceedings to compel him, I might not have been inclined to make this order. But we have no evidence that he can pay, and on the other hand there is *primâ facie* evidence that he cannot. For an order was made in the former suit by Vice-Chancellor *Hall* that he should give security for costs on the ground of poverty; and as he did not do this, the suit was dismissed. I think the proper order in this case will be that all proceedings in the action be stayed till the costs of the former action are paid; the costs of this application, both here and below, to be costs in this action.

LINDLEY, L.J.:—

I am of the same opinion. I do not wish to add much to what has been said by the Lord Justice; but I desire to call attention

(1) 2 K. & J. 458.

to the fact that the practice has never been settled, and we are now called to decide what is really a new point. We must therefore act on principle, and the principle is that a person ought not to be harassed by vexatious litigation. There are several ways in which a married woman can bring an action. If she is a pauper, she can bring an action without a next friend; and if she is not a pauper she can have recourse to Order XVI., rule 8, and obtain leave of the Court to sue without a next friend, in which case she would generally have to give security for costs. But if she cannot sue in either of these methods, she must select a next friend who is not a pauper, but is able to be answerable for costs. If she does not do so, is it right that she should be entitled to bring another action by another next friend without paying the costs of the first action? I am disposed to say, No, and I must so decide unless there is an authority to the contrary. In the case cited of *Hind* v. *Whitmore* (1), Vice-Chancellor *Wood* gave an opinion on the point incidentally, but I do not think we can consider the question settled by that case. I am therefore of opinion that we ought to decide this case so as to protect the Defendants against vexatious litigation, and that this second action cannot go on till the costs of the first action are paid.

Solicitors: *W. Stocken; Galmoye & Co.*

(1) 2 K. & J. 458.

M. W.

V.-C. B.

1883

Jan. 20; *Feb.* 3.

In re MILFORD DOCKS COMPANY.

LISTER'S PETITION.

Winding-up—Companies Act, 1862, *ss.* 80, 82 [*Revised Ed. Statutes, vol. xiv. pp.* 220, 221]—*Petitioning Creditor's Debt—Lands Clauses Act*, 1845.

A claim against a limited company by a landowner for the amount of purchase and compensation money in respect of land taken, which has been assessed by arbitration under the provisions of the *Lands Clauses Act*, 1845, does not, until the title has been investigated and accepted by the company, constitute a debt in respect of which the landowner is entitled as an unpaid creditor within the *Companies Act*, 1862, s. 82, to apply for a winding-up order.

THIS was a creditors' petition for winding up the *Milford Docks Company*.

The company was incorporated in 1874 with a capital of £250,000, in shares of £10 each, which was increased by the *Milford Docks Act*, 1875, authorizing the company to raise additional capital not exceeding £150,000, all of which had been subscribed.

The company having served the Petitioners *Ann Lister*, *J. G. Lister*, and *Walter Macfarlane*, in August, 1876, with notice to treat for land of which the Petitioners claimed to be owners, subsequently took possession.

The amount of purchase and compensation money to be paid by the company to the Petitioners in respect of the fee simple of the land taken, was fixed by an award of the 17th of March, 1882, at £6000.

The company had not taken up the award, and after much correspondence, in which, without result, the company were pressed by the Petitioners' solicitor to take up the award and pay the purchase-money, the Petitioners' solicitor, on the 3rd of October, 1882, sent to the company an abstract of title, and on the 20th of October wrote stating that the conveyance was ready, and that unless it was taken up within the next few days proceedings would be taken to wind up the company. No reply having been received to this letter, this petition, containing the usual allegation that the company was insolvent and unable to pay its debts, was presented.

In addition to the £6000 awarded for purchase and compensation money and still unpaid, the Petitioners claimed to be creditors for the further sums of £1612, interest on the £6000 from the date of the notice to treat and entering into possession by the company, and £2000 in respect of certain rent and other outgoings, and of certain disbursements, costs, and expenses properly paid and incurred by the Petitioners in and about the premises.

In opposition to the petition affidavits had been filed in which the title of the Petitioners to the fee simple of the lands taken was denied, and negativing any right in the Petitioners to the purchase and compensation money.

Another petition for winding up the company had been presented by Messrs. *Mowatt & Taylor* as unpaid debenture-holders, but this (*Lister's*) petition was first advertised.

Horton Smith, Q.C., and *Oswald*, in support of the petition:—

As unsecured creditors who cannot obtain payment of their debt the Petitioners, who are unpaid vendors, are entitled *ex debito justitiæ* to a winding-up order: *Buckley* on Joint Stock Companies (1).

A petition for winding up the company having been also presented by Messrs. *Mowatt & Taylor*, our petition, from having been first advertised, is entitled to priority; or if one order is made on both petitions we are entitled to the carriage of the order, it being now settled that the advertisement, and not the presentation of the petition, determines the priority: *United Ports and General Insurance Company* (2); *General Financial Bank* (3); *Storforth Lane Colliery Company* (4).

G. Henderson, and *Swinfen Eady*, also appeared in support of the petition.

Marten, Q.C., and *Levett*, for the company:—

We deny the existence of any debt in respect of which these Petitioners are persons entitled to apply for or obtain a winding-up order under the *Companies Act*, 1862, ss. 80, 82. The fact that

(1) 4th Ed. pp. 185, 186.
(2) 39 L. J. (Ch.) 146.
(3) 20 Ch. D. 276.
(4) 10 Ch. D. 487.

V.-C. B.
1883
In re MILFORD DOCKS COMPANY. LISTER'S PETITION.

the purchase or compensation money has been ascertained by an award or verdict in proceedings under the *Lands Clauses Act* does not constitute a debt giving the landowner a right of action for the amount, as the arbitrator or the jury have no authority to determine whether the claimant is entitled to the interest which he claims, and can only assess the value of the interest claimed: *Brandon* v. *Brandon* (1); *Ex parte Cooper* (2); and until acceptance of the title and execution of the conveyance there is no actual debt: *Howell* v. *Metropolitan District Railway Company* (3); *Guardians of East London Union* v. *Metropolitan Railway Company* (4).

Hemming, Q.C., *Millar*, Q.C., *Northmore Lawrence*, *E. Ford*, *A. R. Kirby*, *William Latham*, and *Seward Brice*, also appeared on the petition.

Horton Smith, in reply:—

The Petitioners are in the position of unpaid vendors who have a lien upon the land for their purchase-money, and as they have sent an abstract to which no objections were taken, and written stating that the conveyance was ready, they are entitled to the money, the right to which has been held in *Howell* v. *Metropolitan District Railway Company* (5) to arise "on executing or tendering a conveyance to the company." Even if the purchase-money, though fixed by award, is not recoverable as a debt until the conveyance has been executed, the costs and disbursements do not stand on the same footing: *Capell* v. *Great Western Railway Company* (6); and in respect of these there is a good petitioning creditor's debt.

Marten:—The award disallows a portion of the Petitioners' costs, and there is no allegation that the costs have been taxed, or of any application to tax.

BACON, V.C.:—

I think the objection must be allowed. The Act of Parliament is clear and explicit, and its object not to be misunderstood. Any

(1) 2 Dr. & Sm. 305.
(2) 2 Dr. & Sm. 312.
(3) 19 Ch. D. 508.
(4) Law Rep. 4 Ex. 309.
(5) 19 Ch. D. 508, 515.
(6) 9 Q. B. D. 459, 461.

creditor may present a petition under sect. 82, and though the amount is not fixed in that section the Court has on several occasions declined to entertain petitions for a less sum than £50 (the amount mentioned in sect. 80 as the test of inability by a company to pay its debts); and if this had not been so I should decline to entertain a petition in respect of a debt below £50, having regard to the enactments of that statute. Now the claim by the Petitioners is a claim as unpaid vendors. Vendors they are no doubt, or intended to be. Unpaid they are no doubt, but are they unpaid creditors? Not of the sum mentioned in the award, because until a title is made out satisfactorily, such as the Court would force upon a purchaser, it cannot be said that any debt and costs are due. It might turn out upon the investigation of this title that although the purchasers, the company, were not in a position to dispute the value of the land which they took as to the sum mentioned in the award, yet that this sum was not payable to these Petitioners, but to some other person. How then can I say that under sect. 82 these Petitioners are creditors of the company? Until they have made out their title they cannot be said to be entitled to the money mentioned in the award. The title never has been investigated. I am quite aware of the statement in the affidavits that the deeds lay upon the table, and that they might have been looked at then. That does not shew an investigation of title nor a neglect to investigate it then, and so an acceptance of the title. What takes place afterwards when the abstract is delivered shews clearly that in the contemplation of both parties it was necessary to make out a title. No title has yet been made out, and the authorities are clear and distinct that there is no debt due by the purchaser, who is liable to pay something to somebody, or that that constitutes a debt between him and the vendors.

Then it is said that to the costs at least the Petitioners are entitled. Now there is no distinct mention in the petition of costs. A quantity of items are huddled together; rent and disbursements and other expenses. How much I have no means of telling. When the award is turned to it appears that only three days' costs of the reference were allowed to the vendors, the present Petitioners. No taxation has taken place, and it is

V.-C. B.
1883
In re MILFORD DOCKS COMPANY. LISTER'S PETITION.

impossible to assign any sum of money—whether more or less than £50—to that matter. Upon these grounds, in my opinion, the case does not come within the provisions of the statute.

A great deal of time has been spent, and a great many things done which it is impossible to approve of, but the Petitioners are not within the terms of the statute. They are not unpaid creditors, or rather they are not creditors, because a creditor is always unpaid. They are not creditors who are entitled to present a petition, and upon that ground I must dismiss the petition; but considering the enormous expense which has been added to this case by the affidavits filed, and the evidence which has been gone into by the Respondents—who had that objection to take which has been taken, and which, if they had taken it earlier, would have put an end to the petition, inasmuch as in my judgment it is an answer to the petition—the costs of all those proceedings ought not to be paid by the Petitioners.

Solicitors: *Johnson & Weatheralls; Newman, Stretton, & Co.; Trinders & Romer; F. Heritage; Jordan.*

F. G. A. W.

In re ALEXANDRA PALACE COMPANY.

FRY, J.
1883
March 3.

Company—Winding-up—Jurisdiction—Adjustment of Rights of Contributories—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 109 [*Revised Ed. Statutes, vol. xiv.* p. 226].

Under sect. 109 of the *Companies Act*, 1862, the Court has jurisdiction to adjust the rights *inter se* of contributories *quâ* contributories; it cannot enforce equities which persons who, as tortfeasors (being also contributories) have been ordered to pay money under sect. 165, may have against other persons, who happen also to be contributories, to compel them to make good the money so ordered to be paid.

ADJOURNED SUMMONS.

The articles of association of this company contained a provision that all dividends on shares should be made "only out of the clear profits of the company." Notwithstanding this provision the directors of the company in the years 1874 and 1875 paid to the holders of preference shares in the company out of capital dividends amounting in the whole to £12,671 19*s.* 8*d.* This amount was obtained partly by means of money received from an insurance company on the occasion of a fire by which the *Alexandra Palace* was burnt down, and partly by means of loans made expressly for the purpose by the *London Financial Association* and Messrs. *Kelk & Lucas*. Both the *Association* and *Kelk & Lucas* were holders of some of the preference shares. In November, 1876, an order was made to wind up the company. In the winding-up *Kelk & Lucas* were admitted as creditors of the company for the sum of £6219 7*s.* 10*d.*, in respect of the loans made by them to pay the above-mentioned dividends, and for the sum of £231,255 10*s.* 11*d.* in respect of other claims against the company; and the *London Financial Association* were admitted as creditors for £6219 7*s.* 10*d.* in respect of the loans, and for £205,933 5*s.* 11*d.* in respect of other claims against the company. The admitted proofs by other creditors of the company amounted in the whole to £26,697 8*s.* 1*d.*

On the 6th of May, 1882, upon the application of the official liquidator, Mr. Justice *Fry* made an order declaring five of the former directors of the company jointly liable to pay to the

FRY, J.
1883
In re ALEXANDRA PALACE COMPANY.

liquidators (with interest) so much of the dividends improperly paid on the preference shares as was derived from the insurance money, and to pay in respect of the moneys borrowed to pay the dividends such a sum as would enable the liquidator to pay on all the debts proved against the company such a dividend as would have been payable on all the debts proved against the company (other than the borrowed moneys and interest thereon) in case no proof had been made of those sums and interest, or any of them (*vide* 21 Ch. D. p. 149, where the facts are fully stated). This order was expressly made without prejudice to the rights of the directors against any creditors or shareholders of the company who were parties or privies to the payments of dividend out of capital. The Chief Clerk by his certificate, made in pursuance of this order, found that the total amount payable by the directors by virtue of the order was £2696 19*s.* 1*d.*

The directors then took out a summons in the winding-up asking that the proofs of the *London Financial Association* and *Kelk & Lucas* respectively, so far as they were made in respect of the moneys advanced by them respectively to pay the dividends, might be expunged, and that such dividend (if any) as had been paid on the proofs so expunged, might be repaid; that the *London Financial Association* and *Kelk & Lucas* respectively, might be ordered to pay to the liquidators the dividends which they had received on the preference shares held by them respectively (with interest); that it might be declared that the *London Financial Association* and *Kelk & Lucas* respectively were not entitled to receive any payment out of the sums ordered to be paid by the order of the 6th of May, 1882, and that a proper proportionate part of such part of those sums as would have been payable to them respectively might be paid to the applicants; and that, as respected any sums which the *London Financial Association* and *Kelk & Lucas* might be held liable to pay or repay as aforesaid, the liquidator might be ordered to impound and retain all dividends payable to them respectively on any debts proved by them against the company, and to apply the moneys so retained in satisfaction of those sums; and that, if necessary, the applicants might be at liberty to use the name of the liquidator for the purpose of enforcing the liability of the *London Financial Association* and

Kelk & Lucas, in respect of the premises or otherwise in respect of the dividends paid on the preference shares.

Cozens-Hardy, Q.C., *Northmore Lawrence*, and *Dauglish*, for the summons:—

The object of the summons is to prevent *Kelk & Lucas* and the *London Financial Association*, who were parties to the breach of trust, from participating in the moneys recovered from the directors in respect of it, and to compel them to recoup out of dividends payable to them in the winding-up the money which the applicants have been ordered to pay. The Court has jurisdiction under sect. 109 of the *Companies Act*, 1862, which provides that "the Court shall adjust the rights of the contributories amongst themselves and distribute any surplus that may remain amongst the parties entitled thereto." Any creditor or contributory may apply to expunge a proof, and delay is no objection: *Ex parte Harper* (1). The Court can act on the analogy of such a case as *Raby* v. *Ridehalgh* (2), in which tenants for life were ordered to make good to trustees what they had been compelled to pay in respect of loss occasioned by a breach of trust committed at the instance of the tenants for life, and that order was made in the action in which the liability of the trustees was declared.

This is a matter arising out of the due administration of the assets, and it would be more convenient and less expensive to have the question decided in the winding-up than in an action. At any rate, leave might be given to us to use the name of the liquidator to recover the dividends paid on the preference shares.

Cookson, Q.C., *Everitt*, Q.C., and *Medd*, for the *London Financial Association*, and

E. Beaumont, for *Kelk & Lucas*, were not called upon.

Glasse, Q.C., and *Speed*, for the liquidator.

FRY, J.:—

It appears to me that I have no jurisdiction to entertain this summons. [His Lordship stated the facts, and continued:—]

Messrs. *Kelk & Lucas* and the *London Financial Association* are

(1) 21 Ch. D. 537. (2) 7 D. M. & G. 104.

FRY, J.
1883
In re ALEXANDRA PALACE COMPANY.

creditors and contributories of the company. The directors, who have taken out the summons, are tortfeasors, who are liable under my previous order to pay a sum of money to the company. The directors say that they have certain equities against Messrs. *Kelk & Lucas* and the *Association*, which will result in giving them a right to all the dividends which *Kelk & Lucas* and the *Association* may be entitled to receive on the aggregate amounts of their proofs, to such an extent as will make good the sum which the directors have been ordered to pay. That is the nature of their claim, and the object of the present summons is to work out that right by impounding those dividends. I say that that is the nature of the summons, because, although it is of a very complicated character, it has been stated by Mr. *Cozens-Hardy* emphatically that that is the substance of it, and that all the rest is machinery, and I have no doubt that he has spoken with his usual exactitude.

Now I do not find that I have any authority to make such an order for the purpose of working out such an equity between a tortfeasor to the company and creditors or contributories of the company. It was suggested that the 109th section of the Act gives me jurisdiction. That section requires that "the Court shall adjust the rights of the contributories amongst themselves, and distribute any surplus that may remain amongst the parties entitled thereto." It may be true, and I believe it is, that Messrs. *Kelk & Lucas*, the *Association*, and the directors are all contributories of the company, but the rights which the directors now desire to enforce have nothing whatever to do with their position as contributories.

As to dividing the surplus amongst the parties entitled thereto, it is clear that there is no surplus or probability of a surplus to distribute, therefore I am afraid that jurisdiction cannot be invoked in the present instance.

I have inquired whether there is any other section of the Act which enables me to adjust equities between creditors of the company and tortfeasors to the company, but none has been referred to. I have inquired whether any authority can be cited for working out such an equity in a winding-up, and it has been admitted that no such authority can be produced.

It is said that I ought to follow the analogy of *Raby* v. *Ride-*

halgh (1), and in that way give effect to the present claim. It appears to me, however, that that authority does not at all bear on the present question, and that in the winding-up of a company I can only exercise the statutory jurisdiction. Nor can I forget that to allow equities of this sort to be worked out by proceedings in a winding-up would be highly inconvenient, because in many cases it would arrest the primary object of the winding-up while disputes of an entirely collateral nature were being discussed between some of the parties.

I think, therefore, as regards the general object of this summons, that it is beyond my jurisdiction, and it is desirable that I should express this opinion at this early stage in order that if I am wrong I may go into the merits when the Court of Appeal has determined that I have jurisdiction.

It has been pressed upon me that some portions of the summons, at any rate, ought to be allowed, for instance, that which relates to the expunging of the proofs. But the expunging of the proofs is only a step towards acquiring the dividends on the aggregate proofs, and I do not think I ought to grant a portion of the relief asked by the summons, when it is admitted that it is only a step towards obtaining that larger relief which I hold that I have no jurisdiction to give.

Then I have been urged to allow the applicants to use the name of the official liquidator in order to recover from Messrs. *Kelk & Lucas* and the *Association* certain dividends which they have received on the preference shares. It seems to me that, if those dividends can be recovered, they ought to belong to the liquidator, as liquidator, to be distributed by him amongst the creditors of the company, at any rate, those who are not implicated in these matters, and there is no reason why I should give away money which belongs to the company, or to the liquidator on behalf of the company, to these directors, who certainly have not shewn any great merits on the present application. If it had been shewn that the liquidator had refused to take any proceeding which he could have properly taken to recover these dividends the matter would have stood in an entirely different position. But no such evidence has been given.

(1) 7 D. M. & G. 104.

FRY, J.
1883
In re ALEXANDRA PALACE COMPANY.

The result is, as it appears to me, that not only are some parts of the summons confessedly beyond my jurisdiction, but the whole summons is in substance beyond my jurisdiction. Therefore I dismiss it with costs.

Solicitors for Directors: *Trinders & Romer.*

Solicitors for *London Financial Association: C. & S. Harrison & Co.*

Solicitors for *Kelk & Lucas: Fladgate, Smith, & Fladgate.*

Solicitors for Liquidator: *Dawes & Sons.*

W. L. C.

FRY, J.
1883
Feb. 26, 27; *March* 5, 6, 12, 19.

BOSWELL *v.* COAKS.

[1881 B. 363.]

Purchase by Person in Fiduciary Relation—Solicitor and Client—Trustee in Bankruptcy—Duty to disclose Facts—Solicitor in Administration Action—Leave to bid at Sale.

In an administration action part of the property of the testator was ordered to be put up for sale by auction, and leave was given to the solicitor for the Defendant (the executor) to bid at the sale, which was to be conducted by the Plaintiffs' solicitors independently of him. At the auction the property was not sold, and the Court afterwards sanctioned a contract for its sale to the Defendant's solicitor and another person:—

Held, that the effect of the order giving leave to the solicitor to bid and of the subsequent approval of the contract was entirely to put an end to the fiduciary relation in which he formerly stood, and to place him in the position of a mere stranger, and that consequently he was under no obligation to disclose to the Court any facts within his knowledge affecting the value of the property.

The contract for purchase was made by the purchasers on behalf of themselves and some other persons, two of whom were the trustee and a member of the committee of inspection in the joint bankruptcy of the testator's surviving partners. The joint estate had a claim for a large amount against the separate estate of the testator, but this claim was not ascertained and admitted in the administration action until several years after the contract for purchase:—

Held, that under these circumstances the trustee in the joint bankruptcy and the member of the committee did not stand in any fiduciary position which could prevent their joining in the purchase.

TRIAL OF ACTION.

This action was brought by two creditors, on behalf of themselves and all other the unsatisfied creditors of Sir *Robert John*

Harvey Harvey, Bart., deceased, and of the firm of *Harveys & Hudsons*, bankers at *Norwich*, of which he was a member, to set aside a sale of a life interest, which formed part of the estate of Sir *Robert Harvey*, to some of the Defendants.

In the year 1870 Sir *Robert Harvey* and Messrs. *R. A. Kerrison & Roger Kerrison* were carrying on the business of bankers in partnership at *Norwich*, under the firm of *Harveys & Hudsons*. On the 16th of July, 1870, a bankruptcy petition was presented against them jointly by a creditor of the firm. On the 19th of July, 1870, Sir *Robert Harvey* committed suicide. On the 21st of July, 1870, a bankruptcy petition was presented by a creditor against the surviving partners, and on the 22nd of July they were adjudicated bankrupts. On the 3rd of August, 1870, *E. C. Bailey* was appointed trustee, and *F. E. Watson* was appointed one of the committee of inspection in the bankruptcy. Mr. *I. B. Coaks*, a solicitor at *Norwich*, was the solicitor of *Bailey* as trustee in the bankruptcy. On the 29th of July, 1870, a suit of *Lacey* v. *Hill* was commenced in the Court of Chancery, on behalf of the separate creditors of Sir *Robert Harvey*, against the sole executor and trustee of his will, for the administration of the real and personal estate of the testator. On the same day another suit of *Leney* v. *Hill* was commenced in the Court of Chancery, on behalf of the creditors of the firm of *Harveys & Hudsons*, against the same Defendant, for payment of the debts due to the creditors of the firm out of any surplus of the real and personal estate of the testator which might remain after satisfying his separate creditors. *Coaks* was the solicitor to the Defendant in both these suits, and Messrs. *Linklater & Co.*, of *London*, were the solicitors of the Plaintiffs in both suits. *Coaks* had previously acted as solicitor to both the Plaintiffs, and he introduced them to *Linklater & Co.*, and an agreement was entered into between them and *Coaks* that the Plaintiff's costs in both suits should be shared between them and *Coaks* on the usual agency terms, as to the *London* charges, and that of the net residue of the country charges, after payment of outgoings, &c., one-fourth should go to *Linklater & Co.* and three-fourths to *Coaks*. On the 5th of August, 1870, an administration decree was made in both the suits.

FRY, J.
1883
BOSWELL
v.
COAKS.

Under the will of General Sir *Robert John Harvey* (the father of Sir *Robert Harvey*), who died in 1860, Mr. *E. K. Harvey*, a younger brother of Sir *Robert Harvey*, was entitled to an income of more than £13,000 a year for his life. In the year 1860, Sir *Robert Harvey* purchased this life interest from his brother for £60,000. On the 25th of January, 1872, an order was made in the administration suits that the life interest should be sold by auction under the direction of the Court. On the 13th of March, 1872, Lord *Romilly*, the then Master of the Rolls, made an order giving leave to *Coaks* to bid at the sale by auction, but gave the conduct of the sale to Messrs. *Linklater & Co.*, upon their undertaking not to communicate any particulars to *Coaks*, and to carry out the sale wholly independently of him. The agreement between Messrs. *Linklater & Co.* and *Coaks* as to the sharing of costs was communicated to the Master of the Rolls, and he was satisfied with the undertaking of *Coaks* that he would not participate in the costs relating to the sale. The life interest was put up for sale by auction, on the 2nd of July, 1872, the reserved price being £60,000, but no sale was effected. Immediately after the abortive sale a proposal was made by *Coaks* and Mr. *C. J. Bunyon*, to purchase the life interest, upon terms which were afterwards embodied in a written agreement, dated the 13th of July, 1872, and made between the Plaintiff *Lacey*, described as the vendor, of the one part, and *Bunyon* and *Coaks* of the other part. This agreement was ultimately sanctioned by the Master of the Rolls on the 26th of July, 1872. The agreement provided that *Bunyon* and *Coaks* should purchase the life interest for £40,000. The agreement contained the following provisions (*inter alia*): "The vendor shall be furnished upon signing this agreement with the written opinions of three medical men of eminence in their profession as to the insurability or non-insurability of the life of Mr. *E. K. Harvey*, founded upon actual examination by them of him made in the month of June last, on behalf of insurance offices of which they are respectively the medical examiners, and also a statutory declaration by the purchasers that such medical men are the only medical men who to the knowledge or belief of the purchasers have since the 1st of June last been consulted on behalf of any life insurance offices

upon the question of such insurability or non-insurability. Such opinions shall be submitted to the Master of the Rolls, to decide whether the said sum of £40,000 is a fit and proper sum to be accepted by the vendor for the property, and the vendor and the purchasers shall, subject as aforesaid, abide by his decision."

The Master of the Rolls on the 26th of July, 1872, decided that the sum of £40,000 was a fit and proper sum to be accepted for the life interest, and confirmed the contract, which was accordingly carried out.

The purchase was made by *Coaks* and *Bunyon*, on behalf of themselves and four other persons, viz., *Bailey*, *Watson*, *William Cadge*, and *E. K. Harvey* himself.

On the 11th of July, 1876, an order was made in the administration suits allowing *Bailey*, as trustee in the bankruptcy, to prove against the separate estate for the sum of £600,000 which Sir *Robert Harvey* had fraudulently misappropriated out of the assets of the firm. This decision was afterwards affirmed by the Court of Appeal and by the House of Lords (*vide Lacey* v. *Hill* (1), *Read* v. *Bailey* (2)).

At the time when this action was commenced dividends had been paid to the creditors both in the administration suits and in the bankruptcy, but a considerable balance remained due to the separate creditors of Sir *Robert Harvey* and also to the joint creditors of the firm.

The action was brought against *Coaks*, *Bunyon*, *Bailey*, *Watson*, *Cadge*, and *E. K. Harvey*. *Hill*, the executor of Sir *Robert Harvey*, and the *Norwich Union Life Assurance Society*, who were mortgagees of the life interest, were also Defendants.

The Plaintiffs alleged that, notwithstanding the leave to bid at the sale given to *Coaks*, and the confirmation by the Court of the subsequent contract for sale, *Coaks* stood in a fiduciary position towards the creditors of Sir *Robert Harvey*, joint and separate, and that *Coaks* had concealed from the Court certain material facts within his knowledge as to the insurability and probable duration of the life of *E. K. Harvey*, which it was his duty to disclose.

The Plaintiffs also alleged that the purchasers had not fulfilled

(1) 4 Ch. D. 537. (2) 3 App. Cas. 94.

FRY, J.
1883
BOSWELL
v.
COAKS.

the obligations imposed upon them by the provisions of the contract for sale which are above stated.

The Plaintiffs also insisted that, by reason of the position of *Bailey*, as trustee in the bankruptcy, and of *Watson*, as one of the committee of inspection, those Defendants were incapacitated from becoming purchasers of the life interest.

The Plaintiffs claimed to have the sale set aside, subject to the mortgage to the *Norwich Union Society*, on the terms of repaying the £40,000 with interest, the Defendants accounting for the income which they had received under the purchase.

Sir *Hardinge Giffard*, Q.C., *Charles Russell*, Q.C., *Cookson*, Q.C., *Crossley*, Q.C., *H. A. Giffard*, Q.C., and *Langworthy*, for the Plaintiffs:—

Apart from the order giving him leave to bid the Defendant *Coaks* stood in a fiduciary position; he was the solicitor to the Defendant in the administration suits, and was really also the solicitor to the Plaintiffs in those suits. His duty was to do the best he could at the sale for the vendors, and to give them advice against his own interest if he was minded to buy. He could not bid at the sale without the leave of the Court. If he did so through an agent, not in his own name, the sale could be set aside at the election of the vendors, who may be looked on as his *cestuis que trust*: *Gibson* v. *Jeyes* (1); *Pisani* v. *Attorney-General for Gibraltar* (2); *Savery* v. *King* (3); *Edwards* v. *Meyrick* (4). This disability is not confined to trustees for sale, it attaches to any person who occupies a fiduciary position. The reason for the rule is the danger of allowing a man who by reason only of his fiduciary position has acquired a knowledge of the property to be sold to gain an advantage over his *cestui que trust*: *Hill* on Trustees (5); *Kerr* on Fraud (6); *Ex parte Bennett* (7).

And after the fiduciary relation has ceased, still the person who formerly held that relation cannot maintain a purchase from his *cestui que trust* unless he has made a full disclosure of all

(1) 6 Ves. 266, 278.
(2) Law Rep. 5 P. C. 516, 536.
(3) 5 H. L. C. 627.
(4) 2 Hare, 60.
(5) Page 554.
(6) Page 113.
(7) 10 Ves. 381.

material facts within his knowledge. He does not stand in the position of a mere stranger; he cannot avail himself as against his *cestui que trust* of the knowledge which he acquired while he held the fiduciary position: *Hill* on Trustees (1); *Ex parte Bennett* (2); *Aberdeen Railway Company* v. *Blakie* (3); *Hamilton* v. *Wright* (4); *Pooley* v. *Quilter* (5); *Eyre* v. *Macdonnell* (6); *Gibbs* v. *Daniel* (7); *Carter* v. *Palmer* (8); *Imperial Mercantile Credit Association* v. *Coleman* (9); *Dunne* v. *English* (10).

Neither the order giving *Coaks* leave to bid at the sale nor the subsequent approval by the Master of the Rolls of the agreement for sale to him and *Bunyon* did away with the fiduciary relation entirely; though the sale could not after that be set aside at the mere election of the *cestuis que trust*, it was still the duty of *Coaks* to make a full disclosure of everything within his knowledge affecting the value of the property. He had not ceased to be the solicitor of the parties to the action. The liberty to bid was given on the condition that he should be as fair and honest to the Court as he was bound to be to his clients. After the auction was over the liberty to bid was exhausted, and he could not afterwards negotiate for the purchase as a mere stranger, even if he could bid as a stranger at the auction.

On the ground of non-disclosure by *Coaks* the sale ought to be set aside.

The evidence also shews that *Coaks* and *Bunyon* did not discharge the obligation which they undertook by their agreement for purchase.

At any rate as regards the Defendants *Bailey* and *Watson* the sale cannot stand. They obtained no leave to bid or to purchase, and they stood in a fiduciary relation to the joint estate of the surviving partners, and that estate had a claim against the separate estate of the testator. Their duty, therefore, was to get as good a price as possible for the life interest, in order that the separate estate might be as large as possible.

(1) Page 555.
(2) 10 Ves. 381, 395.
(3) 1 Macq. 461.
(4) 9 Cl. & F. 111, 121–123.
(5) 4 Drew. 184, 189; 2 De G. & J. 327.
(6) 15 Ir. Ch. 534, 547.
(7) 4 Giff. 1.
(8) 1 Dr. & Wal. 722, 743.
(9) Law Rep. 6 H. L. 189.
(10) Ibid. 18 Eq. 524.

FRY, J.
1883
BOSWELL
v.
COAKS.

[*Reynell* v. *Sprye* (1); *Tate* v. *Williamson* (2); *Holman* v. *Loynes* (3); and *Brooke* v. *Lord Mostyn* (4), were also referred to.]

[FRY, J., referred to *Arkwright* v. *Newbold* (5).]

Davey, Q.C., and *Cozens-Hardy*, Q.C., for the Defendant *Coaks*:—

The Plaintiffs have ignored altogether the consequences of the order giving leave to *Coaks* to bid. It is said the case is like that of a trustee for sale asking the leave of the Court to buy the property himself. It may be that in such a case the sale would be set aside if he did not give the Court full information when he obtained leave to buy. But nothing of that sort is shewn here; what is said is, that the fiduciary relation continued after the order giving leave to bid was made. The question is one of fact. Was *Coaks* a person in whom the Court or any of the parties placed any confidence for advice after the order giving him leave to bid, or in the negotiations which took place after the auction? On the contrary, they were negotiating with him at arm's length. If this was not so the Court would have placed him in a position in which his duty and his interest were in conflict. That could not have been the intention of the order. Was he bound to say, though we have offered £40,000 for the property, I know my friends will be ready, if you press them, to give more? The question is, did he in fact stand in a confidential relation to the vendors? The moment the relation of solicitor and client is put an end to the solicitor is entitled to use aa he pleases any information which he acquired during its subsistence, though he cannot, so long as the relation subsists, use to the prejudice of his client any information which he acquires. This view is supported by *Gibson* v. *Jeyes* (6); *Coles* v. *Trecothick* (7). A trustee for sale can buy if by the leave of the Court he divests himself of that character, and, when that leave is given, the fiduciary relation is at an end; he is at once put at arm's length, and is not bound to make any disclosure. The

(1) 1 D. M. & G. 660.
(2) Law Rep. 2 Ch. 55.
(3) 4 D. M. & G. 270.
(4) 2 D. J. & S. 373.
(5) 17 Ch. D. 301.
(6) 6 Ves. 266, 278.
(7) 9 Ves. 234.

relation must either remain *in toto*, or be put an end to entirely: *Campbell* v. *Walker* (1); *Cane* v. *Lord Allen* (2). The effect of the order giving him leave to bid was to place *Coaks* at arm's length with the persons who were interested in the sale of the property.

[They were stopped by the Court.]

Sir *F. Herschell*, S.G., and *Northmore Lawrence*, for the Defendant *Bunyon*;

Rigby, Q.C., and *H. Burton Buckley*, for the Defendant *Bailey*;

H. Matthews, Q.C., and *Chadwyck-Healey*, for the Defendant *Watson*;

Higgins, Q.C., and *Stirling*, for the Defendant *Cadge*; and

Sir *H. James*, A.G., and *W. Phipson Beale*, for the Defendant *E. K. Harvey*, were not called upon.

Whitehorne, Q.C., and *W. Phipson Beale*, for the mortgagees.

Merewether, Q.C., and *Knipe*, for the executor of Sir *R. Harvey*.

FRY, J., after stating the facts, continued:—

The equity suggested is that, though the leave to bid was given, Mr. *Coaks* still remained in a fiduciary position towards the estate. It is said that the effect of leave to bid is, not to place a person who was in a fiduciary position at what is commonly called arm's length, and to put an end to that fiduciary position; but that it only varies the right of the *cestui que trust* to this extent, that whereas before the leave to bid he could at his mere election have set aside the transaction, after the leave to bid is granted he is no longer at liberty to set it aside at his mere election, but is bound to prove that there was some non-disclosure of a material fact which the person permitted to bid was obliged to disclose. In other words, it is said that Mr. *Coaks*, having obtained this leave to bid, was still under his original obligation to disclose everything which it was material to the vendor to know, and that

(1) 5 Ves. 678. (2) 2 Dow. 289.

FRY, J.
1883
BOSWELL
v.
COAKS.

if that disclosure was not made the sale could be set aside; and that the effect of the leave to bid was to limit the right to set it aside to that particular contingency. In my judgment nothing could be more inconvenient than such a rule, or more at variance with the general principles of the Court. The Court strives anxiously to prevent a person from being placed in a position in which his interest shall pull him one way and his duty shall pull him the other: and that is the very reason why persons standing in a position in which they have duties towards others are not allowed to maintain an interest of their own adverse to that duty. It is said here that Mr. *Coaks*, notwithstanding his liberty to bid, was bound to disclose everything which it would be material to the vendor to know. What would be the result of such a rule? It would amount to this: that Mr. *Coaks* having leave to bid, as he subsequently did, £40,000, would have been bound to disclose his own willingness, if such were the case, to give £41,000 or £42,000; and that he would have been bound to admit that if he were pressed a little harder more money would be forthcoming. It appears to me to be obvious that no transaction of bargain and sale could be reasonably conducted on any such principle as that, and if that were the meaning of giving leave to bid, I am bound to say that, in my opinion, no such leave to bid ever ought to be given. Is there any authority for the proposition which has been urged on behalf of the Plaintiffs? It is admitted that there is none whatever. Is there any authority for the view to which I have already expressed my adhesion, and which would have been urged upon me by the Defendants' counsel if I had heard them further? There certainly is an authority which looks in favour of the view for which they contend. I refer to *Campbell* v. *Walker* (1) before Lord *Alvanley*. There the Judge was dealing with the difficulty in which a trustee is placed, even if he is willing to give more for the estate than any other purchaser. He said this: "The only thing a trustee can do to protect his purchase is, if he sees that it is absolutely necessary the estate should be sold, and he is ready to give more than anyone else, that a bill should be filed, and he should apply to this Court by motion to let him be the purchaser. That is the only way he can protect himself; and there are cases

(1) 5 Ves. 678, 681.

in which the Court would permit it, as if only £500 was offered and the trustee will give £1000. The consequence would be, the Court would do that which this rule is calculated to procure. The Court would divest him of the character of trustee, and prevent all the consequences of his acting both for himself and for the *cestui que trust*, for the reason of the rule is, that no man shall sell to himself: a case in which it is impossible for the Court to know that he did not do all he ought to have done." Though the passage is not perhaps so clear as it might be, it appears to me that Lord *Alvanley* considered that giving leave to bid prevented all the consequences of a person acting both for himself and for his *cestui que trust*. In other words, to use a common but forcible expression, it placed the trustee at arm's length with the estate, which it would be otherwise his duty to protect. And what applies to trustee and *cestui que trust* plainly applies to a solicitor who is acting in an action. That appears to me to be in this case really the crucial question, because, although it was faintly suggested that independently of fiduciary relationship, there was enough here to set the contract aside, the stress of the argument lay undoubtedly on the continued subsistence of the fiduciary relation, notwithstanding the liberty to bid.

It has been further argued that the original leave to bid was merely a leave to bid at the auction, and was exhausted on the 2nd of July. Even if that was so it is plain that the taking up of the negotiation which immediately ensued upon the auction, by the Master of the Rolls, was substantially a leave to Mr. *Coaks* to go on with the negotiation, because without that leave the Court would never have dealt with him at all. [After referring to the provisions of the agreement of the 13th of July, 1872, above stated, his Lordship continued:—] This obligation was taken upon themselves by the purchasers. This obligation they were bound to perform honestly. This was the measure of their obligation to disclose. They were, in my opinion, under no obligation but that. [And, after referring to the evidence, his Lordship said:—] I am unable to find that the obligation to disclose, which had been taken on themselves by the purchasers, was not performed.

One other question remains. It is said that, whatever may be

FRY, J.
1883
BOSWELL
v.
COAKS.

the right of the other Defendants to purchase, Messrs. *Bailey* and *Watson* were disqualified by having duties relating to the joint estate of the Messrs. *Kerrison*, and that that estate had a claim against Sir *Robert Harvey's* estate. It is said, therefore, that in their characters of trustee and member of the committee of inspection of Messrs. *Kerrisons'* estate, they were bound to desire that Sir *Robert Harvey's* estate should be as large as possible, whereas in their character of purchasers they would naturally desire to give as little for this estate as they could. But it is to be observed that, as trustee and member of the committee of inspection of Messrs. *Kerrisons'* estate, they had neither knowledge nor duty with regard to Sir *Robert Harvey's* estate. They had no means of knowing, from their position with regard to Messrs. *Kerrisons'* estate, anything with regard to this life estate which was part of Sir *Robert Harvey's* property. They had no duty towards that property, they had no duty with regard to this sale, they had no right to intervene in the sale, and they were not called upon to advise with regard to the sale; and, lastly, it must be observed that at that time they had no ascertained interest in Sir *Robert Harvey's* estate, because, as I have already mentioned, it was not until the year 1876 that the claim on behalf of Messrs. *Kerrisons'* estate against Sir *Robert Harvey's* estate was admitted by the Master of the Rolls. There is no reason, as it appears to me, and no authority which justifies me in saying that they were in a fiduciary position, which would prevent them from concurring in the purchase. The result is, that in my opinion the Plaintiffs' case has failed, and I dismiss the action with costs.

Solicitors for Plaintiffs: *Whites, Renard, & Co.*, agents for *M. S. Emerson, Norwich.*

Solicitors for Defendants: *Johnson & Master; Smythe & Brettell; G. F. Hudson, Matthews, & Co.*, agents for *Bailey, Cross, & Barnard, Norwich; S. W. Johnson & Son; Aldridge, Thorn, & Morris*, agents for *Copeman & Cadge, Loddon; Blake & Heseltine*, agents for *Field, Son, & Pulley, Norwich; W. Sturt*, agent for *I. B. Coaks & Co., Norwich.*

W. L. C.

In re GREAVES' SETTLEMENT TRUSTS.

FRY, J.

1883

March 2, 16, 17, 20.

Will—General Devise or Bequest—Exercise of General Power of Appointment—Money liable to be invested in Land—Wills Act (1 *Vict. c.* 26), *s.* 27 [*Revised Ed. Statutes, vol. viii. p.* 35].

By a marriage settlement executed in March, 1823, real estate was conveyed to trustees in fee, to their use during the life of the wife, on trust to pay the rents to her for her life, and after her death to such uses as the husband should by deed or writing, to be by him executed and delivered in the presence of and attested by two witnesses, appoint, and, in default of appointment and subject thereto, to the common dower uses in favour of the husband. There was a power for the trustees to sell the property with the consent of the husband and wife during their joint lives, and the money to arise from any sale was to be laid out in the purchase of other land, to be settled to the same uses, and until the re-investment should be made the money was to be invested in (*inter alia*) the public funds, and the income was to be payable to the persons to whom the rents of the land to be purchased would go. During the joint lives of the husband and wife, and before the date of the husband's will, the land was sold, and the proceeds of the sale were invested in New 3 per Cents. in the names of the trustees. No purchase of land was ever made, but the income of the stock was paid to the wife during her life. In October, 1844, the husband made his will (which was signed by him and sealed, and attested by two witnesses). The will contained the following bequest: "I also give and bequeath all the money and moneys that I die possessed of, whether in the public funds or in the care of *W.*, or elsewhere, after my funeral expenses are paid, unto the sole use and behoof of my children hereinbefore named, share and share alike." *W.* was one of the trustees of the will, and at the time of the testator's death he had in his hands some money belonging to the testator. The testator had no money of his own in the funds, nor had he any power of appointment other than that contained in the settlement. The testator died on the 28th of December, 1851. His wife died on the 24th of October, 1881. After her death the question arose whether the testator had by his will exercised the power of appointment contained in the settlement, or whether the sum of stock passed as unappointed to his heir-at-law:—

Held, that inasmuch as the wife had a right to call for the reinvestment of the stock in land, it must be considered as having been land at the time of the testator's death, and that the will did not operate as an exercise of the power of appointment:

Held, consequently, that the stock passed to the testator's heir-at-law.

PETITION.

This was a petition under the *Trustee Relief Act*. By a settlement dated the 19th of March, 1823, and made in contemplation of the marriage (which was afterwards duly solemnized) of *Jonathan*

FRY, J.
1883
In re GREAVES' SETTLEMENT TRUSTS.

Greaves with *Catherine* his wife (then *Catherine White*, spinster), certain real estate was assured to *Francis Field* and *William Underhill* in fee, to certain uses therein stated until the solemnization of the then intended marriage, and after the solemnization thereof to the use of *Field* and *William Underhill*, their heirs and assigns, during the remainder of the life of *Catherine Greaves*, upon trust to pay the rents to her, and from and immediately after her decease to the use of such person and persons, for such estate and estates, either absolutely or conditionally, upon such trusts, and for such intents and purposes, and with, under, and subject to such charges, powers, provisoes, limitations, conditions, restrictions, declarations, and agreements, and in such sort, manner, and form, and with or without a power of revocation and new appointment, as *Jonathan Greaves* should from time to time or at any time or times, by any deed or deeds, writing or writings, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, limit or appoint the same, and in default of some such declaration, direction, limitation, or appointment, and in the meantime and until such direction, limitation, or appointment should be made, and as to such and so much of the hereditaments respectively of which no such declaration, direction, limitation, or appointment should be made, which should not be a complete disposition of the whole and absolute fee simple of and in the hereditaments whereof such declaration, direction, limitation, or appointment should be made, then as and when the uses and estates thereby declared, directed, limited, or appointed should severally cease and determine, to the common dower uses in favour of *Jonathan Greaves*. The settlement contained a power for the trustees at any time after the intended marriage, with the consent of the husband and wife during their joint lives, to sell the property. And it was provided that all the money to arise from any sale under the power should be laid out in the purchase of other freehold hereditaments in *England* of an estate of inheritance in fee simple, free from incumbrances, and that the hereditaments so to be purchased should be thereupon forthwith conveyed and settled to the same uses as the hereditaments which had been sold, and that until the re-investment in land should be made the purchase-money should be placed out at

interest in the public funds, or on Government securities, or upon any good real security in *England*, and that the annual proceeds should from time to time go and be payable to the persons to whom the rents of the hereditaments to be purchased would go.

During the joint lives of the husband and wife, and before the date of the husband's will, the hereditaments were sold with their consent, and the purchase-money was invested in New 3 per Cent. Annuities. The purchase-money was never re-invested in land, but when this petition was presented the sum of New 3 per Cents. was standing in the name of the then trustee of the will.

Jonathan Greaves made his will dated the 17th of October, 1844, which was signed by him and sealed, and was attested by two witnesses. The will contained (*inter alia*) the following bequest: "I also give and bequeath all the money and moneys that I die possessed of, whether in the public funds or in the care of *William Underhill*, Esq., of the *Stock Exchange, London*, or elsewhere, after my funeral expenses are paid, unto the sole use and behoof of my children hereinbefore named, share and share alike, to be theirs, their heirs, and assigns, for ever." *Jonathan Greaves* died on the 28th of December, 1851. He had not exercised the power of appointment given to him by the settlement otherwise than by the above clause in his will, if that was an exercise of it. *William Underhill* died on the 13th of May, 1877. At the date of the death of *Jonathan Greaves* there was a sum of money belonging to him in the care of *William Underhill*, which sum was not subject to the trusts of the settlement. The testator had no money of his own in the funds, and he had no power of appointment other than that given to him by the settlement. *Catherine Greaves* died on the 24th of October, 1881. After her death the then trustee of the settlement transferred the New 3 per Cent. Annuities into Court. This petition was presented by the eldest son and heir-at-law of *Jonathan Greaves*, claiming to have the stock transferred to him.

Glasse, Q.C., and *R. W. Ingham*, for the Petitioner:—

No doubt the will, being sealed, is a "writing" within the meaning of the power: *Smith* v. *Adkins* (1). But the stock must

(1) Law Rep. 14 Eq. 402.

FRY, J.
1883
In re GREAVES' SETTLEMENT TRUSTS.

be treated as land, for, so long as she lived, the wife had a right to insist on its being re-invested in land. And there is no devise of real estate. The power, therefore, has not been exercised: *Chandler* v. *Pocock* (1); *Gillies* v. *Longlands* (2); *Cookson* v. *Cookson* (3).

Cookson, Q.C., and *J. G. Wood*, for the other children of the testator:—

The judgment of *Jessel*, M.R., in *Chandler* v. *Pocock* is really in our favour. He says (4) that, by virtue of sect. 27, a bequest of "my personal estate" "should be read as if it included these words, 'I appoint all the personal estate over which I shall have at my decease a general power of appointment by will.'" And he adds, "What is personal estate or what is real estate you must find out from the nature of the property itself: it may be real estate as to devolution as regards the remainderman who takes in default of the exercise of the power, or even as regards the testatrix herself while she is alive; but the question is, Is it actually real estate, or is it actually personal estate?" The Court of Appeal (5) did not differ from this view of the Master of the Rolls.

The question is whether the property was *de facto* personal estate at the time of the testator's death; if so, a general bequest of personalty will amount, by virtue of sect. 27, to an exercise of the power of appointment. If this was not an exercise of the power of appointment the testator had not at the time of his death any property of his own which would satisfy the gift. The effect of sect. 27 is that the gift is to be read as if it included the words, "I give all the money in the funds over which I shall have at the time of my death a general power of appointment by will." The burden of proof is now on those who say that the power has not been exercised. The old rule of law is altered in this respect by the *Wills Act*: *Walter* v. *Banks* (6); *Lake* v. *Currie* (7).

The settlement shews that the subject-matter of the power is either land or stock, for the dividends of the stock are to go as

(1) 15 Ch. D. 491; 16 Ch. D. 648.
(2) 4 De G. & S. 372.
(3) 12 Cl. & F. 121.
(4) 15 Ch. D. 498.
(5) 16 Ch. D. 648.
(6) 1 Jur. (N.S.) 606.
(7) 2 D. M. & G. 536, 548.

the rents of the land would have gone, without any limit of time. Stock is nothing more than a perpetual right to receive dividends: *Blann* v. *Bell* (1). Because as between the heirs and executors of a testator money must be treated as land, it does not follow that it is land for all purposes. The question is whether an intention is shewn to exercise the power.

Renshaw, for the executors.

Glasse, in reply:—

In both *Lake* v. *Currie* (2) and *Walter* v. *Banks* (3) the question was as to a gift of real estate. In the case of real estate you were entitled to look at the state of the property; in the case of personalty you cannot look beyond the will: *Jones* v. *Curry* (4); *Farwell* on Powers (5). The first thing to be ascertained is, what was the testator's property at the time of his death. The power is only to appoint real estate. The money remained real estate until there was some person entitled to elect to take it absolutely as personalty. Sect. 27 does not apply, for there is no general devise in the will. In *Chandler* v. *Pocock*, *Jessel*, M.R., said (6), "Where there are persons entitled to an intermediate interest who, after the death of the testator, have still a right to call for the investment of money in land, there it is real estate of the testator, and a gift of 'my real estate' would pass it, but a gift of 'my personal estate' would not."

March 20. FRY, J.:—

The question which I have now to decide arises between the heir-at-law and the appointees under the will of Mr. *Jonathan Greaves*. The property in question was subject to the trusts of a settlement dated the 19th of March, 1823. [His Lordship stated the effect of the settlement.] On the 17th of October, 1844, *Greaves* executed his will, and he died on the 28th of December, 1851. He left his wife surviving him, and she lived down to the 24th of October, 1881. During the whole of that period she was

(1) 2 D. M. & G. 775, 781.
(2) Ibid. 536, 548.
(3) 1 Jur. (N.S.) 606.
(4) 1 Sw. 66.
(5) Page 180.
(6) 15 Ch. D. 499.

FRY, J.
1883
In re GREAVES' SETTLEMENT TRUSTS.

entitled to a life interest in the fund in question, and without her consent there was no power to discharge the fund from the obligation to invest it in the purchase of real estate. [His Lordship read the above-stated clause in the will of *Greaves*, and continued:—] The question is whether that clause operates as an appointment of the fund in question. It is to be observed that it describes the property with which it deals in two ways. First, there is the general description, "All the money and moneys that I die possessed of." This is followed by a particular enumeration, "Whether in the public funds, or in the care of *William Underhill*, or elsewhere." I think the latter words may be treated as parenthetical, and that they do not enlarge the generality of the previous words. Undoubtedly the question whether the clause operates as an appointment under the settlement is one of intention; that is the primary principle which governs the determination of questions of this kind. I must first inquire whether, independently of sect. 27 of the *Wills Act*, the will expresses an intention on the part of the testator to deal with money in the public funds which was not his own money. It appears to me that it does not. It deals with money in the public funds which he should die possessed of. He did not die possessed of this stock. The legal estate in it was in the trustees of the settlement; the beneficial life interest was in the testator's wife. In no sense did he die possessed of this sum of stock.

I will next inquire what is the effect of sect. 27. [His Lordship read the section.] It is to be observed that, throughout, the language of the section is addressed to bequests of a general description, not to bequests of particular property. It has been suggested that in the present case the property, being *de facto* money, though it was *de jure* land, might pass either by a general bequest of personalty, or by a general devise of realty, and that even if this be not so, the true rule is to look at the *de facto* condition of the property at the time of the testator's death, and if it is then in the condition of money it will pass under a general bequest of personalty, while if it is in the condition of land it will pass under a general devise of realty. As to the first of these propositions it is manifest that inconvenience would result from it, and it appears to me that both propositions are inconsistent with the decided

cases. The first authority to which I will refer is *Guidot* v. *Guidot* (1). There Lord *Hardwicke* said (2), "The question is whether these two sums are to be considered as money or land; I see but very little doubt in this case. The articles say it shall be laid out in the purchase of lands of inheritance, or in church, and leasehold. Then the Court must take it to be the one or the other; and during the life of the husband and the wife, if laid out, it must have been in one or the other. No sort of election was made by the husband; then at the time of the will and his death it stood in equity, as it did in the articles, either to be laid out in freehold or leasehold; and therefore this Court will call it one or the other, according to the rule in equity, that what is agreed to be done must be considered as done." Still more express is the language of *Jessel*, M.R., in *Chandler* v. *Pocock* (3). He said (4), "What the authorities do decide is this, that where there are persons entitled to an intermediate interest, who, after the death of the testator, have still a right to call for the investment of money in land, there it is real estate of the testator, and a gift of 'my real estate' would pass it, but a gift of 'my personal estate' would not. I agree, not only is that covered by authority, but I should think that the question was not arguable at the present day, as the authorities are so old."

In the next place it was suggested that this will ought to be read as if it had included the words, "I give and bequeath all money in the public funds over which I shall have at the time of my death a general power of appointment by will," and that, as there was then no other money in the public funds over which the testator had any power of appointment, there is an adequate description of the subject-matter of the gift. It appears to me that this is not a legitimate mode of using sect. 27. That section is addressed to a general bequest, not to any enumerated particulars of a bequest. If I were to introduce words into the clause in the way suggested I should be using sect. 27, not to enlarge the operation of a general bequest, but to give an intensity of expression to a part of a bequest which the instrument itself does not

(1) 3 Atk. 254.
(2) Ibid. 255.
(3) 15 Ch. D. 491.
(4) Ibid. 499.

FRY, J.
1883
In re GREAVES' SETTLEMENT TRUSTS.

contain. In my opinion this is not the proper function of sect. 27. I hold, therefore, that the bequest did not operate as an appointment of this fund, but that it passed to the testator's heir-at-law under the ultimate limitations of the settlement.

Solicitors: *Wood & Wootton*, agents for *H. C. Guy, Southampton; James Edell; H. J. & T. Child.*

W. L. C.

FRY, J.
1883
April 7.

In re GLOAG AND MILLER'S CONTRACT.

[1883 G. 70.]

Vendor and Purchaser—Waiver of Objections to Title—Possession taken by Purchaser before Completion—Notice of Defects of Title—Distinction between removable and irremovable Defects.

If a contract for the sale of land is silent as to the title which is to be shewn by the vendor, the legal implication that the purchaser is entitled to a good title may be rebutted by evidence that, before the execution of the contract, the purchaser had notice of defects in the vendor's title.

But, if the contract expressly provides that a good title shall be shewn, the purchaser is entitled to insist on a good title, notwithstanding that before the execution of the contract he had notice of defects in the vendor's title.

If the contract contains no stipulation as to possession being taken by the purchaser before completion, and he takes possession with knowledge that there are defects in the title which the vendor cannot remove, the taking possession amounts to a waiver of the purchaser's right to require the removal of those defects, or to repudiate his contract. If, on the other hand, the defects are removable by the vendor, the taking of possession does not amount to such a waiver.

ADJOURNED SUMMONS.

This was a summons under the *Vendor and Purchaser Act*, 1874.

On the 23rd of October, 1882, the following agreement in writing was entered into between *Joseph Richardson Gloag* and *Frank Samuel Miller*:—

"I *Joseph Richardson Gloag* hereby agree to sell *Athole Lodge, Enfield*, with all outhouses thereto belonging, also the ground

included in my titles thereto, freehold, for £2400, subject to delivery of valid title to him.

(Signed) "*J. R. Gloag.*

"23/10/82.

"I *Frank Samuel Miller* accept above terms.

(Signed) "*F. S. Miller.*"

The property formed part of an estate known as the *Bush Hill Park* estate, and at the time when the contract was signed the vendor was the assignee of a lease of the property. The lease, however, gave the lessee an option of purchasing the fee simple. The lease contained restrictive covenants as to the use of the land, and the other parts of the *Bush Hill Park* estate were held subject to similar covenants.

On the 8th of June, 1880, the vendor had offered the property for sale by auction, but no sale was then effected. The printed particulars of sale used on that occasion described the property as freehold, and they contained (*inter alia*) the following conditions of sale :—

(3.) "The *Bush Hill Park* estate, of which this property forms part, is registered under the *Land Transfer Act*, 1875, with an absolute title, and this property is subject to the following conditions, viz.—(*a.*) Not more than one house with suitable offices shall be built upon the land until the expiration of thirty years, and such house used only as a private dwelling-house. (*b.*) The trees on the land shall not be cut down, except so far as may be necessary for the erection of such house. (*c.*) The plans for the house and all requisite fences shall be approved by the surveyor for the '*Bush Hill Park* estate,' which approval for the present house has been given. (*d.*) No earth or gravel shall be taken from the land except for building thereon."

"(4.) A copy of the land certificate will be supplied to the purchaser, and no further or other evidence of title shall be required. The vendor will arrange for the production to the purchaser, if required, at the expense of the latter, of the original certificate, which also comprises other property held by other parties. In such certificate it is stated that the estate comprised therein is subject to small payments, amounting to 9*s.* 8*d.* or

FRY, J.
1883
In re GLOAG AND MILLER'S CONTRACT.

thereabouts. It is believed these payments ceased to be made many years ago, and no objection or requisition on the subject shall be made by the purchaser. The property is sold subject to all quit rents, tithes, and other outgoings (if any) to which it is liable. The property is believed to be correctly described, and no compensation or allowance shall be made or claimed by either party on the ground of discrepancy or deficiency in quantities or otherwise. Any evidence of identity which the purchaser may require shall be procured by him and at his expense."

On the 24th of October, 1882, *Gloag's* solicitors sent to *Miller's* solicitor a copy of these particulars and conditions of sale. This was done with the view of enabling *Miller's* solicitor to prepare an agreement for purchase, both solicitors being then ignorant that their clients had already signed an agreement. *Miller's* solicitor read the conditions with a view to preparing an agreement, but, before he had done so, he was informed of the agreement which had been already signed. *Miller*, with the assent of *Gloag*, took possession of the property immediately after the contract was signed, and on the 27th of October he paid *Gloag* £1500, part of the purchase-money. On the 27th of October *Miller* and his wife dined with *Gloag* and his wife at their house in *London*, and on that occasion reference was made in the course of conversation to the existence of some restrictions on the use of the land. On the next day *Miller* and his wife had another interview with *Gloag* and his wife at the property in the presence of some other persons, and the existence of such restrictions was then again referred to in conversation.

After this interview *Miller* continued in possession of the house and made considerable structural alterations in the house, expending over £500 in so doing. On the 31st of October, and again on the 8th of November, 1882, the purchaser's solicitor wrote to the vendor's solicitors pressing for an abstract of the vendor's title to the property. On the 9th of November the vendor's solicitors sent to the purchaser's solicitor an incomplete abstract of title, together with a letter as follows:—"We send you herewith abstract of title. We have not yet received Mr. *Gloag's* certificate of title, and until we had this did not quite see the utility of supplying abstract. The time required in obtaining

the certificate is longer than we expected, but hope to send you abstract of it shortly." The abstract then sent shewed the following title to the property:—An agreement dated the 19th of August, 1876, between *Henry Graves* and *Thomas Taylor Smith*, called the lessors, of the one part, and *John Bentley* (called the lessee) of the other part, whereby it was agreed that, when the messuage thereinafter agreed to be erected had been completed to the approbation of the surveyor for the time being of the lessors, the lessors would grant a lease unto the lessee, his executors and administrators, or such other person or persons as he might direct, of the piece of ground at *Bush Hill Park, Enfield*, shewn on the plan thereon indorsed, with the buildings to be erected thereon, for a term of ninety-nine years from the 24th of June, 1876, at the yearly rent of £24 after the first year. And it was thereby agreed that in the lease to be so granted there should be contained all such covenants and conditions, as well on the part of the lessors as of the lessee, as were inserted in the leases granted by the lessors, a copy whereof was thereunto annexed. And the lessee agreed to expend within nine months from the date of the agreement £700 at least in erecting and finishing on the ground, to the satisfaction of the surveyor, a substantial messuage in such a position and in conformity with the plans, &c., to be previously approved by the surveyor. The lessee should not, at any time during the term, cut down or remove or damage any of the trees standing on the land, nor remove or dispose of any gravel or earth not necessary to be removed or used for the purpose of building, and he was not to use the land for any purpose other than for the purpose of building thereon, nor do or permit any act or thing which might be a detriment or annoyance to the lessors or to their property in the neighbourhood.

The abstract stated that "the draft lease referred to in the abstracted agreement contains a proviso 'that the lessee, his executors, administrators, and assigns, should be at liberty at any time prior to the day of , upon giving to the lessors, their heirs or assigns, six calendar months previous notice in writing of his or their intention so to do, to purchase the fee simple of the said plot of land for such sum as should be equivalent to twenty years' purchase of the ground rent payable in

FRY, J.
1883
In re GLOAG AND MILLER'S CONTRACT.

respect of such plot of land, and such purchase should be completed on the day succeeding the expiration of such notice.'"

The abstract then stated a deed dated the 28th of November, 1878 (indorsed on the agreement of the 19th of August, 1876), whereby *Bentley* assigned the agreement to *Gloag*, his executors, administrators, and assigns, and *Gloag* covenanted to pay the rent and perform the covenants to be contained in the lease.

The abstract then stated a notice, dated the 20th of December, 1878, to *Graves* and *Smith*, that it was the intention of *Gloag* to purchase the fee simple of the plot of land comprised in the agreement for a lease in accordance with the terms of the lease.

The abstract also stated an agreement, dated the 13th of September, 1878, whereby *Graves* and *Smith* agreed to sell, and *Gloag* agreed to purchase, another piece of ground at *Bush Hill Park*, "at the price and subject to the conditions therein set forth."

This was the whole of the abstract.

On the 30th of November, 1882, *Gloag's* solicitors obtained from the Land Registry Office a certificate of *Gloag's* proprietorship of the property, and they sent a copy of it to *Miller's* solicitor on the 1st of December. The certificate was dated the 28th of November, 1882, and it shewed that *Gloag* was, on the 21st of November, 1882, registered as proprietor of the property, with an absolute title. The certificate stated that "such parts of the land, if any, as are affected thereby, are subject to small payments amounting to 9*s.* 8*d.*, or thereabouts." It also stated that certain conditions, "contained in Book A. p. 84," were annexed to the land. These conditions were in fact as follows: "Not more than one house with suitable offices shall be built upon any part of the land transferred to *J. R. Gloag* until the expiration of thirty years from the 20th of November, 1882, and such house to be used only as a private dwelling-house. The trees on the said land shall not be cut down, except so far as may be necessary for the erection of such house. The plans for such house and all requisite fences shall be approved by the surveyor for the time being of *Henry Graves* and *T. Taylor Smith*, or the survivor of them or his heirs, their or his assigns. No earth or gravel shall be taken from the said land except for the buildings to be erected thereon."

The copy of the certificate sent to *Miller's* solicitor did not state the nature of the conditions.

On the 30th of November, *Miller* had been declared a defaulter on the *London Stock Exchange*, of which body he was a member. In consequence of this some delay took place in the delivery of requisitions on the title. The requisitions were sent to the vendor's solicitors on the 28th of December. Among them was the following requisition: "What are the payments amounting to 9*s.* 8*d.*, and the conditions annexed to the land, which are referred to in the certificate, and are the payments annual payments or otherwise? The nature and origin of these several incumbrances and conditions must be shewn, and the land must be released from them before the purchase is completed, as it is sold free from incumbrances and restrictions." To this requisition the vendor's solicitors replied on the 29th of December: "The vendor has made no such payment, and it is believed they ceased to be made many years ago. A copy of the conditions is sent herewith, and can be verified by examination of the register. The land is not sold as free from incumbrances and restrictions, and the purchaser had notice of the existence of the conditions at the time he entered into the contract. The land cannot be released from them. The conditions being applicable to the *Bush Hill Park* estate as a building estate, are for the benefit of all the houses on that estate."

A copy of the restrictive conditions (as above stated) was sent to the purchaser's solicitor with the answers to the requisitions.

On the 9th of January, 1883, the purchaser took out a summons under the *Vendor and Purchaser Act*, asking a declaration that his requisitions and objections in respect of the title to the property were valid, and that a good title to the property had not been shewn in accordance with the contract, and for consequential relief.

Everitt, Q.C., and *Maidlow*, for the summons:—

The abstract sent on the 9th of November shewed that the lessee had an absolute right to purchase the fee of the property; it did not appear that the fee would be subject to any restrictions. The purchaser contracted for an absolute title to the fee, and he

FRY, J.
1883
In re GLOAG AND MILLER'S CONTRACT.

is not bound to accept a title with any restrictions: *Andrew* v. *Aitken* (1); *In re Higgins and Hitchman's Contract* (2).

Even if the purchaser had notice of the restrictive conditions before he entered into the contract, still that notice cannot alter the express provisions of the contract that he is to have a valid title to the property: *Cato* v. *Thompson* (3); *Phillips* v. *Caldcleugh* (4).

Primâ facie taking possession by a purchaser after the delivery of an abstract, and not in pursuance of any provision or contract, is a waiver of objections to the title appearing upon the abstract, but not of objections which do not appear by the abstract: *Bown* v. *Stenson* (5); *Osborne* v. *Harvey* (6).

[FRY, J.:—In that case it was in the power of the vendor to remove the objections.]

When possession is taken with the assent of the vendor, acts of ownership incident to possession, and the preparation of a conveyance, are not a waiver of objections to the title: *Burroughs* v. *Oakley* (7).

[*Cozens-Hardy*, Q.C., referred to *Burnell* v. *Brown* (8).]

If the vendor had resumed possession he could not have enforced specific performance of the agreement: *Knatchbull* v. *Grueber* (9). Objections to title cannot be said to have been waived so long as requisitions relating to them are being pressed: *Knatchbull* v. *Grueber* (10).

Cozens-Hardy, Q.C., and *Method*, for the vendor, were not heard.

FRY, J. (after referring to the agreement for sale and purchase), continued:—

Two questions have been argued, (1) whether the purchaser's right to a good title is repelled by communications made to him or notice given to him by the vendor before the contract was

(1) 22 Ch. D. 218.
(2) 21 Ch. D. 95.
(3) 9 Q. B. D. 616.
(4) Law Rep. 4 Q. B. 159.
(5) 24 Beav. 631.
(6) 1 Y. & C. (Ch.) 116.
(7) 3 Sw. 159.
(8) 1 J. & W. 168.
(9) 3 Mer. 124.
(10) 1 Mad. 153.

signed; (2) whether the right to a good title has been to any extent waived by acts done by the purchaser subsequently to the contract.

In my view the law as to the first question stands in this way: When the contract is silent as to the title which is to be shewn by the vendor, and the purchaser's right to a good title is merely implied by law, that legal implication may be rebutted by shewing that the purchaser had notice before the contract that the vendor could not give a good title. If the vendor before the execution of the contract said to the purchaser, I cannot make out a perfect title to the property, that notice would repel the purchaser's right to require a good title to be shewn. But, if the contract expressly provides that a good title shall be shewn, then, inasmuch as a notice by the vendor that he could not shew a good title would be inconsistent with the contract, such a notice would be unavailing, and whatever notice of a defect in the title might have been given to the purchaser, he would still be entitled to insist on a good title. In the present case it appears to me that an absolute right to a good title is given by the contract, and that consequently no notice given to the purchaser before the contract can exonerate the vendor from the obligation to shew a good title. So far I agree with the argument on behalf of the purchaser.

But then arises the question, has the purchaser waived this right by anything which he has done since the execution of the contract. Before considering the facts of this case I will take the opportunity of observing that, in my judgment, there is a broad distinction between cases in which the contract provides that a good title shall be shewn, and also provides that possession may be taken by the purchaser before the title is completed, and cases in which the purchaser takes possession without any express stipulation in the contract. And, again, there is a broad distinction with reference to acts which may amount to a waiver of the right to insist on a good title, between cases in which the objections to the title of which the purchaser knows are removable by the vendor, and cases in which they are irremovable. For instance, if the purchaser takes possession knowing that the vendor has mortgaged the property, this will not amount to a

FRY, J.
1883
In re GLOAG AND MILLER'S CONTRACT.

waiver of his right to have the mortgage paid off by the vendor. On the other hand, if a purchaser knew that the estate which he had agreed to purchase was subject to a right of sporting over it, vested in some third person over whom the vendor had no control, taking possession by the purchaser with knowledge of the existence of this right would be a waiver of his right to call for the release of the sporting right, or to repudiate his contract if it could not be released.

[His Lordship then referred to the particulars and conditions of sale which were sent to the purchaser's solicitor, and to the abstract of title sent on the 9th of November, and continued:—] It is quite plain that the abstract which was then sent was sent as an abstract of the vendor's title to the property. It shewed that the vendor was the assignee of an agreement for a lease of the house, which was to contain all the conditions inserted in the leases granted to the lessees, a copy of which was annexed thereto, and an option to the lessee to purchase the fee, and that the vendor had entered into a subsequent agreement with the lessees to purchase some other adjoining land at *Bush Hill Park*, "subject to the conditions therein set forth." It appears to me that no solicitor reading this abstract with the knowledge which the purchaser's solicitor already had, that the *Bush Hill Park* estate was subject to certain restrictive conditions, could doubt that some at least of those conditions were the conditions referred to in the agreement of the 13th of September, 1878. That appears to me an obvious inference, because it would have been a fraud, or, at all events, gross negligence on the part of the vendor not to have stated the nature of the restrictive conditions if they were in substance different from those mentioned in the conditions of sale. [His Lordship then stated what happened at the interviews which took place between the purchaser and the vendor on the 27th and 28th of October, and continued:—] After these interviews the purchaser continued in possession, and made structural alterations in the house to a considerable extent. After this he got into pecuniary difficulties, and the alterations were left unfinished, and some of the fixtures which he had put up were removed. These appear to me to be very strong acts on the part of the purchaser, knowing what he did as to the existence of conditions

restricting the use of the land, and I think they bring the case within the earlier authorities, which shew that, when a purchaser knows of the existence of conditions or circumstances affecting the title to the property, and over which the vendor has no control, and he notwithstanding thinks fit to take possession of the property, or to remain in possession and to make structural alterations in it, he waives, not his right to require a title to the property to be shewn, but his right to insist on the particular irremovable objections of which he had knowledge before he took possession. It is said, however, that the restrictive conditions to which the property is actually subject are not identical with those of which the purchaser had knowledge, and I think there is a difference with regard to the date from which the period of thirty years was to commence. This may or may not entitle the purchaser to compensation for that difference, but it cannot give him a right to repudiate or rescind his contract. I dismiss the summons with costs.

Solicitor for Purchaser: *Henry Taylor.*
Solicitors for Vendor: *Travers Smith & Braithwaite.*

W. L. C.

KAY, J.

1883

March 6.

ANGUS *v.* McLACHLAN.

[1881 A. 1174.]

Innkeeper's Lien—Effect of taking Security—Bailee—Custody of Goods.

An innkeeper who accepts security from his guest for the payment of hotel charges does not waive his lien at common law upon the goods of the guest for the amount of such charges unless there is something in the nature of the security, or in the circumstances under which it was taken, which is inconsistent with the existence or continuance of the lien and therefore destructive of it.

An innkeeper retaining the goods of his guest by virtue of such lien is not bound to use greater care as to their custody than he uses as to his own goods of a similar description.

Observations on *Cowell* v. *Simpson* (1).

THE Plaintiff in this action was the proprietor of an hotel at which the Defendant and his wife had resided from the 13th of November, 1880, to the 11th of June, 1881. The Defendant was a master mariner, and the owner of six sixty-fourth shares in the ship *Leonidas*, of *London*, the principal owners of which were Messrs. *Patton & Co.;* and the bill of sale by which these shares had been transferred to him was, in the month of March, 1881, in the hands of his then solicitors, Messrs. *Phelps, Sidgwick & Biddle.*

During the first month, bills for his hotel charges were delivered to the Defendant, at short intervals, and duly paid by him down to the 11th of December, 1880. About that time the Defendant got into pecuniary difficulties owing, as he stated, to the non-settlement of a claim which he had against the Messrs. *Patton*, and he made no further payments to the Plaintiff. The Plaintiff, however, upon his promising to pay when he could, allowed the Defendant and his wife to stay at the hotel; and on the 8th of March, 1881, took from him a letter in the following terms:—

"Dear Sir,—I hereby charge the bill of sale on the ship *Leonidas* with the payment of any account due or to become due from myself to you.

"Yours truly,

"*F. J. McLachlan.*"

(1) 16 Ves. 275.

The evidence as to the circumstances attending the giving of this letter will sufficiently appear from the judgment. The Plaintiff was afterwards informed that the letter was of little or no value as a security; but upon the faith of it, and of further promises by the Defendant to pay, allowed him and his wife to stay on until the 11th of June, 1881, when hotel charges to the amount of £83 8*s.* 11*d.* being due, he told the Defendant that he must either pay or go. The Defendant was unable to pay, and the Plaintiff locked up his room, and detained his goods, and the Defendant and his wife left the hotel.

The following day, the Plaintiff placed the Defendant's goods in a closet where his own goods of a similar character were kept, and there they remained until September, 1881.

In August, 1881, the Plaintiff brought this action, claiming the £83 8*s.* 11*d.*, or to have an account taken of what was due to him from the Defendant, with a declaration that the £83 8*s.* 11*d.*, or the amount found due, was a charge on the Defendant's shares in the ship *Leonidas*, and payment of the amount, and in default foreclosure or sale.

On the 5th of August, 1881, the Plaintiff obtained an order restraining the Defendant from selling or dealing with the shares in the ship until judgment or further order, and on the 30th of September, a receiver was appointed, and an account directed against the Defendant. On the last-mentioned day, the Defendant's goods were delivered up to the receiver, and, as the Defendant stated, upon examination by him it appeared that some of them, such as certain furs and wearing apparel, had been damaged by moths and rats, or mice.

The Defendant then delivered a statement of defence and counter-claim, in which he stated that the Plaintiff had requested him either to pay or to give security; that he had accordingly given the security comprised in the letter of the 8th of March, 1881; that the effects which the Plaintiff had detained, notwithstanding such security, far exceeded in value the amount of the Plaintiff's claim, and that during such detention he had not taken proper care of them, and consequently they became greatly damaged and injured; and he estimated his loss thereby at £100, and claimed to set off the amount of such loss against

KAY, J.
1883
ANGUS
v.
MCLACHLAN.

any claim which the Plaintiff had against him. In the evidence in support of the counter-claim the Defendant and his wife attributed the damage to their goods to the action of moths and rats, or mice.

Hastings, Q.C., and *H. Greenwood*, for the Plaintiff.

Yate Lee, for the Defendant:—

By taking the security of the charge contained in the letter of the 8th of March, 1881, the Plaintiff waived or abandoned his lien upon the goods of the Defendant, and with it his right to detain them. The doctrine of lien implies a contract, and when a special security is taken the implied contract is gone: *Cowell* v. *Simpson* (1); *Chambers* v. *Davidson* (2); *Balch* v. *Symes* (3); *Jones* v. *Thurloe* (4); 41 & 42 Vict. c. 38; *Willcock* on Innkeepers (5).

He also contended that the Plaintiff was liable for any damage to the goods so detained by him, and that the Defendant was entitled to set off the amount of such damage against any claim the Plaintiff might have against him.

[KAY, J., intimated that he only desired to hear a reply upon the question of damage.]

Hastings, in reply, contended that an innkeeper was, as a gratuitous bailee, only bound to use ordinary care as to goods in his custody; *i.e.*, the same care as he took of his own goods of a similar description: *Coggs* v. *Bernard* (6); *Calye's Case* (7); *Dawson* v. *Chamney* (8); and that the evidence shewed that the innkeeper had done so in this case.

Yate Lee, in rejoinder, contended that a man who wrongfully insisted on detaining the goods of another against his will ought to use greater care than was required in the case of an ordinary bailee. He also referred to *Scarfe* v. *Morgan* (9).

(1) 16 Ves. 275.
(2) Law Rep. 1 P. C. 296.
(3) T. & R. 87, 92.
(4) 8 Mod. 172.
(5) Pages 77, 78.
(6) 1 Sm. L. C. 7th Ed. p. 188, 207, 214.
(7) 1 Sm. L. C. 7th Ed. p. 122; 8 Rep. 32 a.
(8) 5 Q. B. 164.
(9) 4 M. & W. 270.

KAY, J.

1883

ANGUS v. MCLACHLAN.

KAY, J.:—

On the 13th of November, 1880, the Defendant and his wife went to stay at the Plaintiff's hotel. Bills were delivered to the Defendant weekly and he paid the first bills. Then difficulties arose, the Defendant was in want of money, and could not pay the bills, and a discussion took place upon the subject. The evidence as to what occurred is contradictory. The Defendant alleges that he told Mrs. *Gibson*, the Plaintiff's manager, that he was not able to pay the bills at that time, that he had a difficulty in getting money from the Messrs. *Patton*, and would not be able to realize his shares in the ship for some months, and that she said she knew his wife's family, and was not anxious about the bills. The Plaintiff states that the Defendant in March, 1881, talked about giving security for the amount due from him, and said that his lawyer had given him a letter to write and sign, which he did and gave it to the Plaintiff. The letter was as follows:—[His Lordship read the letter and proceeded.] The Defendant says that the Plaintiff at first seemed satisfied, but afterwards said that the letter was of no value. The Defendant's wife tells rather a different story, she says that there was a conversation with Mrs. *Gibson*, and that Mrs. *Gibson* said she was content to wait for payment, that the Plaintiff said he wished for a letter and that "if he got the letter he was agreeable for her and her husband to remain for six months from the date of the letter, or until the action against Messrs. *Patton* was settled." The husband does not however depose to this conversation, and the Plaintiff and Mrs. *Gibson* both distinctly deny this version of the story. The effect of their evidence is this. They say that they were constantly pressing the Defendant for payment, that in order to induce the Plaintiff to allow him to stay on at all this letter was brought, but that no promise to allow him to do so was ever made by the Plaintiff, and that when the Defendant's then solicitors refused to advance anything upon the letter the promises of the Defendant induced the Plaintiff to allow him to stay on.

In this state of things I am asked to say that the acceptance of this letter was a waiver of the Plaintiff's lien, and thus a question of very considerable importance is raised. It has been

KAY, J.
1883
ANGUS
v.
MCLACHLAN.

said in argument that if an innkeeper, having by common law a lien upon the goods of his guest, accept any security at all from him, that is *ipso facto* a waiver of the lien. That, in my opinion, is not the law. The case of *Cowell* v. *Simpson* (1), where a solicitor was held by the acceptance of a security to have waived his lien on the papers of his client, was relied upon as an authority in support of that contention. As we all know, it was a very common course with Lord *Eldon* to give a preliminary judgment, and afterwards a more considered judgment. In his first judgment in that case he says (2), "Where by the usage of trade a person has a lien on goods in his hands for work performed upon them, and farther, for work upon other goods, not then in his possession, having been delivered over, according to the usages of different trades, it is settled by modern decisions that by taking a security the lien is gone, even with regard to the goods in his possession; and cannot accompany that special security; which determines the implied contract. It is necessary to see upon what principle that stands. I rather think it is not regulated by the usage of trade. It has been accounted for in this way; that the lien is gone by the effect of the intention to substitute the special contract for the implied one: the necessities of mankind requiring that the goods should be delivered for consumption, it is not to be presumed that the lien was to be extended through the whole period, which would create much difficulty in the usual course of dealing between tradesmen and their customers. I have however heard that denied; and it has been put upon a rule of law, that the special contract removes the implied one; but if that is the ground, this case would deserve much consideration. The solicitor taking a security, which has three years to run, as the client may have occasion for his papers, there is as much reason, that the lien should not accompany the security through that period, as in the instance of a trade; and the conclusion is equally difficult, that the papers, if the client has occasion for them, could be withheld. I am not at present satisfied that this lien exists." His Lordship afterwards delivered a more considered judgment, in which he said, "Looking through the general doctrine of lien, as applicable to all cases, except the purchase of an estate,

(1) 16 Ves. 275. (2) 16 Ves. 279, 280, 282.

with reference to which it has in a series of decisions been extended, it may be described as *primâ facie* a right accompanying the implied contract. In the case of a factor, who has a lien both for his expenditure upon the goods in his possession and his general balance upon former transactions, entering into a special contract for a particular mode of payment he loses the lien. In various trades the demand being for work and labour; applied in some instances upon the particular goods, and others upon other goods also, though the possession had been given up, it is universally laid down, that if that takes place under a special agreement, there is no such lien; and if it commenced under an implied contract, and afterwards a special contract is made for payment, in the nature of the thing the one contract destroys the other." And he added later in his judgment, "My opinion, therefore, is that where these special agreements are taken, the lien does not remain; and whether the securities are due or not, makes no difference." But in that case the special security taken was for three years, and was in its nature such as to be entirely inconsistent with the retention of the lien, and that was the reason why Lord *Eldon* held the lien to have been lost. It is true that in another case *Balch* v. *Symes* (1), Lord *Eldon* states the doctrine in rather more general terms, and says, "Notwithstanding the Court of King's Bench has expressed a doubt whether my decision was right in the case of *Cowell* v. *Simpson* (2), I still entertain the opinion that an attorney who takes a security abandons his lien. That doctrine, however, will not apply to sums which are not covered by the security, and as to those sums, therefore, the lien must be considered to remain." But I do not understand him to have meant that every security will destroy a lien; and my view on this is strengthened by *Hewison* v. *Guthrie* (3), where Chief Justice *Tindal* says, "It is well established that if a security is taken for the debt for which the party has a lien upon property of the debtor, such security being payable at a distant day, the lien is gone." As I understand the law it is not the mere taking of a security which destroys the lien, but there must be something in the facts of the case, or in the nature of the security

(1) T. & R. 87, 92.
(2) 16 Ves. 275.
(3) 2 Bing. N. C. 755, 759.

KAY, J.
1883
ANGUS
v.
MCLACHLAN.

taken, which is inconsistent with the existence of the lien, and which is destructive of it. In this case the lien is within the provisions of 41 & 42 Vict. c. 38, by virtue of which the innkeeper not only has a passive lien, but also the active right to sell the goods upon giving the notice required by the Act. Is it probable that he would have given up this active lien? The very contract as stated by Mrs. *McLachlan*, if it was proved, which I hold it was not, is inconsistent with this hypothesis. It was that if the Plaintiff got the letter he was agreeable for the Defendant and his wife to remain six months. That does not mean that he would have been agreeable for them to go away without paying and take their things. There is nothing in the case inconsistent with the continuance of the lien which the Plaintiff undoubtedly had before the security was given.

His Lordship then considered the question of the damage which had been sustained by the goods of the Defendants, and after referring to the case of *Dawson* v. *Chamney* (1), and stating that the general law was that a bailee, such as an innkeeper, was not bound to be more careful in keeping the goods of his guests than he was as to his own, and examining the evidence on this head, held that the Defendant had failed to shew that amount of negligence which would make the innkeeper liable, and consequently that the counterclaim must be dismissed with costs.

Solicitors: *G. H. Finch ; A. H. Holmes.*

(1) 5 Q. B. 164.

W. W. K.

FOLLETT *v.* PETTMAN.

KAY, J.

1883

Feb. 27, 28; *March* 7.

[1882 F. 507.]

Will—Codicil—Confirmation of Will by Codicil referring to Will by Date—Implied Revocation of Intermediate Codicil.

A testator by will gave legacies to three of his daughters, and devised and bequeathed his residuary real and personal estate upon trusts for his wife and children.

By a first codicil in 1878 he revoked one of the legacies in his will and increased another, concluding "in all other respects I confirm my said will."

By a second codicil, after reciting that he was desirous of altering the residuary devise contained in his will, he made a specific devise, and in all other respects confirmed his will.

He afterwards made a third codicil, by which, after referring to his will by date and reciting a promise to that effect, he directed his trustees to grant an underlease of a house to his daughter-in-law, and gave his wife a pecuniary legacy in addition to the benefit she derived under his said will, and concluded "in all other respects I confirm my said will except as altered by a certain codicil made thereto in 1878, whereby I revoked a legacy to my daughter *Mary*":—

Held, that the words of confirmation in the first and third codicils were to be read as meaning that the testator did not intend to alter his general testamentary dispositions further than in the specific way mentioned in those codicils; and that the devise in the second codicil being clear, no intention to revoke it had been shewn with sufficient clearness to enable the Court to reject that devise.

SPECIAL CASE.

George Follett, by his will dated the 27th of February, 1875, after giving furniture to his wife, nineteen guineas to each of his daughters *Mary* and *Ellen*, and making specific bequests of two houses in *Radnor Street*, *Peckham*, devised and bequeathed all his real and personal estate not thereinbefore otherwise disposed of to trustees upon trust to pay an annuity to his widow, and subject thereto upon trust for his five children in equal shares.

The testator afterwards made three codicils to his said will. The first, which was dated the 27th of February, 1878, was in the following terms:—

"I, *George Follett*, of *Godwin Road, Margate*, builder, declare

KAY, J.
1883
FOLLETT
v.
PETTMAN.

this to be a codicil to my last will dated the 26th day of February, 1875. Whereas in my said will I have given £19 19*s.* to each of my daughters, *Mary Ann Follett* (now *Mary Ann Campoverde*) and *Ellen Coutts*, Now I hereby revoke the legacy given to the said *Mary Ann Campoverde*, and I give to the said *Ellen Coutts* £40 instead of the sum of £19 19*s.* In all other respects I confirm my said will."

The second codicil was dated the 4th of November, 1878, and the material parts of it were as follows:—

"This is a codicil to the last will and testament of me, *George Follett*. . . . Whereas I am desirous of altering the residuary devise contained in my said will and of making the specific devise hereinafter contained: Now, therefore, I hereby give and devise my freehold" . . . "house and premises known as *Novelty House, Margate*" . . . "to the use of my son *William George Follett* and *Charlotte Matilda Pettman*" . . . "as tenants in common." . . . . And in all other respects I hereby ratify and confirm my will."

The testator signed and affixed to the second codicil the following memorandum, which was attested by the two witnesses to the second codicil:—

"I herewith lodge my codicil to my will with Mrs. *Pettman*, and especially request my witnesses thereto to certify that such is my wish. 4th Nov., 1878."

The third codicil was dated the 4th of August, 1879, and was in the following terms:—

"This is a codicil to the last will of me, *George Follett*, of 60, *Godwin Road, Margate*, builder, such will bearing date on or about the 27th day of February, 1875. Whereas I promised several years ago to give my daughter-in-law, *Louisa Follett*, the house in which she resides, situate and being *Ivy Cottage, Radnor Street, Peckham*, and am desirous that such promise should be carried into effect as soon as possible after my decease, I accordingly direct my executors, *Walter George Follett* and *Francis Smith Walker*, to grant to her for her separate use an underlease of the said house for the residue of my term therein, less three

days, at the yearly ground rent of £3. I give to my wife, *Susan Follett*, £50 in addition to the benefit which she derives from my said will, such sum to be paid within one month after my decease. In all other respects I confirm my said will, except as altered by a certain codicil thereto made in 1878, whereby I revoked a legacy given to my daughter, *Mary Ann Campoverde*. In witness whereof I have set my hand this 4th day of August, 1879."

The testator died on the 8th of December, 1881.

The question for the opinion of the Court was whether under the circumstances *Novelty House* passed by the residuary devise in the will, or by the specific devise in the second codicil.

Ingle Joyce, for the Plaintiff, *William George Follett*.

Kekewich, Q.C., and *E. S. Ford*, for the beneficiaries other than *Charlotte Matilda Pettman*:—

By the third codicil confirming his will except as altered by the first codicil, the testator has in effect repeated the residuary devise contained in his will, and so has revoked the alteration of that residuary devise made by the second codicil.

[KAY, J., referred to *Gordon* v. *Lord Reay* (1), where Sir *Lancelot Shadwell* held that a second codicil referring to a will ratified and confirmed everything that was part of it, and so republished a first unattested codicil which was not expressly referred to in the second codicil.]

In *Burton* v. *Newbery* (2) *Jessel*, M.R., dissented from *Gordon* v. *Lord Reay* upon the ground that "where you describe a will by its date" (as in that case) "you do not describe the subsequent codicil as being included in that will;" and laid down the principle that "the setting up instrument must contain a distinct reference to the prior writing, so as to shew that the testator intends that prior writing to be a part of his testamentary disposition."

Here the testator refers to his will by date and to his first codicil by date, but makes no reference whatever to his second codicil.

(1) 5 Sim. 274.

(2) 1 Ch. D. 234, 239, 240.

KAY, J.
1883
FOLLETT
v.
PETTMAN.

In *Green* v. *Tribe* (1) the testatrix in her second codicil referred to her will in general terms, so that, as was held by Mr. Justice *Fry*, the reference was to all the antecedent testamentary dispositions which together made up the will.

Ernest Witt, for the Defendant *Charlotte Matilda Pettman* :—

There is here no sufficient revocation of the second codicil, for a clear devise requires clear words of revocation.

The testator in his third codicil has only partially expressed his intentions, *i.e.*, to the extent to which he intended that codicil to operate, and nothing else was specifically present to his mind, for the words "except as altered by a certain codicil thereto made in 1878," must be regarded as a mere pleonasm; and cannot amount to a revocation of the previous clear specific devise of which he makes no mention. Again, the reference to the first codicil is incomplete, for the revocation of *Mary's* legacy was not the only thing effected by that codicil; and his singling out the revocation for reference coupled with his silence as to the devise in the second codicil shews an intention that it should remain unrevoked.

In *Green* v. *Tribe* Mr. Justice *Fry* considered that *Jessel*, M.R., did not intend to lay down in *Burton* v. *Newbery* (2) that the confirmation by a second codicil of a will referred to by its date would revoke a prior valid codicil; but only that where recourse is had to a subsequent codicil to give vigour to an earlier one, mere reference to the will by its date will not operate on the earlier and inoperative codicil so as to set it up. And it was held in *Green* v. *Tribe* that a series of cases had established that a reference to the date of the original will is not an indication of intention to deprive all instruments, other than the original itself, of any force.

The case most in point is *In the Goods of De la Saussaye* (3), which is entirely in my favour.

Kekewich, in reply.

(1) 9 Ch. D. 231. (2) 1 Ch. D. 234.
(3) Law Rep. 3 P. & M. 42.

May 7. KAY, J.:—

The question which has to be determined in this case is the effect of the words at the conclusion of the third codicil upon the preceding testamentary dispositions of the testator.

It is argued that the effect of the third codicil is to destroy the devise in the second codicil, because by confirming his will except as altered by the codicil revoking the legacy to *Mary Ann* the testator in effect repeated the residuary devise in his will and so revoked the alteration of that residuary devise made by his second codicil.

The question of revocation has always been treated as a question of intention, and this is distinctly recognised in the 20th section of the *Wills Act*.

In *Smith* v. *Cunningham* (1) the testator by a sixth codicil confirmed and republished his will (the date of which he mentioned), and the several codicils thereto respectively bearing date August, 1813, and January, 1818, omitting all mention of any other codicils. The question came before the Ecclesiastical Court whether the omitted codicils could be proved, and it was held they could, partly from indications derived from the manner in which the codicils had been preserved, but mainly from the internal evidence of the codicils themselves. Considerable reliance being placed upon the fact that it appeared in some of them that where the testator intended to revoke he did so in express and formal words.

In *Greenough* v. *Martin* (2) the testatrix had made a will and then a series of codicils by which she left additional legacies to two of her servants by name. She then gave instructions to her solicitor to make a new will including legacies of £1000 each to those two servants. The solicitor suggested that they might be given by codicil, which was done, and he brought the will and read it to her just before she executed the codicil, which ended with the clause, "my said will having been this day read over to me, I hereby confirm the same;" and upon all these facts the Ecclesiastical Court decided that she did not intend the intermediate codicils to have any operation.

Turning to cases which have occurred before a Court of

(1) 1 Addams, 448. (2) 2 Addams, 239.

KAY, J.
1883
FOLLETT
v.
PETTMAN.

construction I find in *Crosbie* v. *MacDoual* (1), by a fifth codicil reciting that by his will dated the 27th of May, 1790, he had appointed *Jackson* an executor, the testator appointed *MacDoual* in his place and concluded "and I do hereby confirm my said will in all other respects." It was argued that the will being referred to by date, this destroyed an intermediate codicil which had revoked a bequest in the will, and thus revived that bequest, but it was held that the effect of the words of confirmation was that the substitution of a new executor was the only point in which the testator intended to make any alteration in his will, and it was pointed out that there was a great distinction between wills and codicils in this respect, because if there were two separate papers both called wills inconsistent with each other, the last is the will, and from the nature of the instrument it revoked the other.

This was followed in *Booker* v. *Allen* (2), *In the Goods of De la Saussaye* (3), and in *Green* v. *Tribe* (4). The case of *Burton* v. *Newbery* (5), which has been cited, is not at all in opposition to this current of authority—it merely decided that a codicil which referred to a will of a particular date did not make effectual a previous codicil which was otherwise inoperative—because in order to incorporate a paper not testamentary, there must be a distinct reference to it.

There is a very clear and strong rule thus stated by Lord Chief Justice *Tindal* in the well known case of *Doe* v. *Hicks* (6), in the House of Lords. If a devise in the will be clear, it is incumbent upon those who contend it is not to take effect by reason of a revocation in a codicil, to shew that the intention to revoke is equally clear and free from doubt as the original intention to devise. This was illustrated by Lord *Selborne* in the recent case of *Farrer* v. *St. Catherine's College, Cambridge* (7), and the rule applies to the present case.

By the first codicil the testator shews that when he intended to revoke he knew how to use express and apt words. If he had

(1) 4 Ves. 610.
(2) 2 Russ. & My. 270.
(3) Law Rep. 3 P. & M. 42.
(4) 9 Ch. D. 231
(5) 1 Ch. D. 234.
(6) 8 Bing. 475; 1 Cl. & F. 20.
(7) Law Rep. 16 Eq. 19.

intended to revoke the clear devise made by the second codicil it must be inferred he would have done it by express words also.

The words of confirmation which he has used are, according to the authorities which I have referred to, to be read as meaning that he does not intend to alter his general testamentary disposition further than by making the gifts contained in that codicil, and I do not think I am at liberty to hold that an intention to revoke the second codicil has been shewn with sufficient clearness to enable the Court to reject the devise thereby made.

Solicitors: *Daniel Birt; E. Gibson.*

W. W. K.

CHITTY, J.

1883

Feb. 8.

In re JAKEMAN'S TRUSTS.

Married Woman—Devise in Trust for Sale—Proceeds of Sale—Reversionary Chose in Action—Husband—Bankruptcy—Creditors' Deed—Concurrence in Wife's Assignment—Acknowledged Deed—Fines and Recoveries Act (3 & 4 *Will.* 4, *c.* 74), *s.* 77 [*Revised Ed. Statutes, vol. vii. p.* 511]—*Bankruptcy Act*, 1849, *s.* 141—*Bankruptcy Act*, 1861.

Under the will of a testator, who died in March, 1862, *M.*, a married woman, was entitled in reversion expectant on the death of a tenant for life to a share of the proceeds of real estate devised to trustees in trust for sale on that event. In August, 1862, in the lifetime of the tenant for life, *M.*'s husband executed a general assignment, under the *Bankruptcy Act*, 1861, of all his property to a trustee for the benefit of his creditors. In August, 1866, he was adjudged bankrupt, and in December following he obtained his discharge. The tenant for life died in January, 1869. By a deed executed in February following, and duly acknowledged by *M.* under sect. 77 of the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74), *M.* and her husband assigned all moneys which should become due to them or either of them under the testator's will to *S.* by way of mortgage. Shortly afterwards the trustees of the will sold the real estate, and ultimately paid *M.*'s share of the proceeds into Court under the *Trustee Relief Act*:—

Held, that the husband was not precluded by the creditors' deed of 1862 or by his bankruptcy in 1866 from concurring with his wife in the mortgage of 1869, and accordingly that the mortgage was valid against the trustee of the creditors' deed and the assignee in bankruptcy.

THOMAS JAKEMAN, who died on the 3rd of March, 1862, by his will devised all his real estate to his wife for life, and after her death to trustees upon trust to sell the same, and, after satisfying the charges attending the sale, to divide the residue of the proceeds equally among his nine nephews and nieces therein named, including *Mary Dicks*, the wife of *William Dicks*.

On the 25th of August, 1862, in the lifetime of the tenant for life, *William Dicks* executed a general assignment of all his estate and effects to *William Roberts* for the benefit of his creditors in like manner as if the said *William Dicks* had at the date thereof been adjudged bankrupt. This deed was afterwards registered at the office of the Chief Registrar in Bankruptcy.

On the 14th of August, 1866, *William Dicks* was adjudged bankrupt, and on the 14th of December following he obtained his

discharge. *Albert Coles* was appointed creditors' assignee in the bankruptcy.

The testator's widow, the tenant for life, died on the 17th of January, 1869.

By an indenture dated the 11th of February, 1869, and made between *William Dicks* of the first part, *Mary Dicks*, his wife, of the second part, and the Petitioner, *Thomas Scriven*, of the third part, and duly acknowledged by *Mary Dicks* under the *Fines and Recoveries Act*, the said *William Dicks* and *Mary Dicks*, according to their respective rights and interests, assigned to *Scriven* all sum and sums of money, rents and interests, which should become due to them, or either of them, under the said will of and in the proceeds of the real estates of the said testator by way of mortgage to secure the repayment to *Scriven* of the sum of £40 then advanced by him to the said *William Dicks* and *Mary Dicks*, and of such further sums as should be thereafter advanced, not exceeding in the whole the sum of £100, with interest at £5 per cent.

On the 11th and 18th of March, 1869, further advances of £40 and £20 were made by *Scriven* to Mr. and Mrs. *Dicks* on the security of the mortgage of the 11th of February, 1869, thus making up the total amount of the mortgage debt to £100.

Shortly after the date of the mortgage deed the trustees of the will sold the testator's real estate, and having set aside out of the net proceeds of sale the sum of £735 4*s.* 5*d.*, being one-ninth part thereof, to answer *Mary Dicks*' share under the will, they deposited the same in their names in the *Northamptonshire Bank* at *Daventry*.

William Dicks subsequently executed in favour of the Petitioners other than *Scriven* various equitable charges on his interest in right of his wife under *Thomas Jakeman's* will.

Mary Dicks died on the 18th of May, 1869.

None of the Petitioners had, at the dates of their incumbrances, any notice of the creditors' deed of the 25th of August, 1862, or of *William Dicks*' bankruptcy. A question arose as to whether the trustees of the will had received due notice of the various incumbrances executed by *William Dicks* and of his creditors' deed and bankruptcy; and, if so, whether they had received notice of the incumbrances prior to their notice of the creditors'

CHITTY, J. 1883 *In re* JAKEMAN'S TRUSTS.

deed and the bankruptcy. An inquiry in Chambers having been directed on this point, it appeared that notices of the mortgage of the 11th of February, 1869, and of the subsequent incumbrances were given, not to the trustees of the will personally, but to their solicitor; and that about the dates of the creditors' deed and of the bankruptcy verbal notices thereof respectively were received by one of the trustees.

In August, 1881, the then surviving trustee of the testator's will paid £939 17*s.* 7*d.*, being the residue, after the retention of certain costs and expenses, of the said sum of £735 4*s.* 5*d.*, and of the sum of £251 11*s.* 2*d.* the accumulated interest thereon, into Court under the *Trustee Relief Act* to the credit of *Mary Dicks'* share of residue bequeathed by *Thomas Jakeman's* will.

The Petitioners prayed declarations that by virtue of the mortgage of the 11th of February, 1869, or otherwise, the Petitioner, *Thomas Scriven*, had a first charge upon the fund in Court, together with interest at £5 per cent. from the date of advance; and that, subject thereto, the other Petitioners were entitled to valid charges on the said fund under the several other incumbrances above mentioned in priority to the rights and interests of persons claiming under the creditors' deed of the 25th of August, 1862, and of the said *Albert Coles* as assignee in *William Dicks'* bankruptcy; and (subject to costs) payment of the Petitioner *Scriven's* mortgage debt of £100 and interest out of the fund, and payment of the residue of the fund to *Mary Dicks'* legal personal representative, when appointed, to be applied by him in accordance with the aforesaid declarations.

The main question raised by the petition was whether *William Dicks* was, by reason of his creditors' deed and of his bankruptcy, precluded from concurring with his wife in the acknowledged deed of the 11th of February, 1869, and thereby making a valid mortgage in favour of the Petitioner *Scriven* as against the trustee of the creditors' deed and the assignee in bankruptcy.

It appeared that *Roberts*, the trustee of the creditors' deed, was dead, and that he had no legal personal representative. The Judge therefore appointed the surviving trustee of *Thomas Jakeman's* will to represent *Roberts* for the purpose of arguing the question.

Chubb, for the Petitioners:—

I submit that *William Dicks* was not debarred by his bankruptcy from concurring with his wife in the acknowledged deed of the 11th of February, 1869, and accordingly that this deed operated as a valid mortgage. It is clear that a wife's interest in the proceeds of real estate devised in trust for sale will pass by a deed acknowledged by her under sect. 77 of the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74): *Briggs* v. *Chamberlain* (1); and that, although the husband must concur in the deed, the power of disposition over the property must be considered as exclusively belonging to her, any interest which the husband might have had in the absence of disposition being got rid of by the disposition, so that the property cannot be attached for his debts: *In re Batchelor* (2); *Cooper* v. *Macdonald* (3).

Maclean, for the assignee in bankruptcy of *William Dicks*:—

This is a case under the *Bankruptcy Act* of 1861, sect. 232 of which virtually incorporates sect. 141 of the *Bankruptcy Act*, 1849; and this latter section expressly enacts that when the assignees have been once appointed the bankrupt can do nothing thereafter to defeat their title. Here the trustees of the fund, in which the husband had an interest in right of his wife, had sufficient notice of his bankruptcy, and that being so, the title of the assignee in bankruptcy must, according to the terms of the 141st section, prevail against that of the particular assignee under the deed of the 11th of February, 1869: *In re Bright's Settlement* (4), the decision in which was referred to without disapproval by the Court of Appeal in *Palmer* v. *Locke* (5).

In *Hole* v. *Escott* (6) it was held that where a bankrupt has a power of appointment over an estate he cannot exercise it so as to defeat the right of his assignees in whom the estate is vested by the bankruptcy. *Cooper* v. *Macdonald* did not deal with this particular point, and neither the 141st section of the *Bankruptcy Act*, 1849, nor *Hole* v. *Escott* were referred to. The only question there was, whether the wife was prevented by a restraint on

(1) 11 Hare, 69.
(2) Law Rep. 16 Eq. 481.
(3) 7 Ch. D. 288.
(4) 13 Ch. D. 413.
(5) 18 Ch. D. 381.
(6) 4 My. & Cr. 187.

CHITTY, J.
1883
In re JAKEMAN'S TRUSTS.

anticipation from concurring with her husband in a disposition of the property; and in *In re Batchelor* (1) the question as to the effect of bankruptcy did not arise.

Bonser, for the trustee of the creditor's deed:—

Although the wife's reversionary interest in the fund was not reduced into possession by the husband, he was absolutely entitled to it in right of his wife, and his assignee had the same right to receive the money as he himself would have had: *Drew* v. *Long* (2); and under sect. 141 of the *Bankruptcy Act*, 1849, the bankrupt was unable to defeat the right of the assignee by concurring with his wife in a disposition of this reversionary interest.

H. W. Andrew, for the trustees of a settlement executed by Mr. and Mrs. *Dicks* subsequently to the mortgage of the 11th of February, 1869.

Chubb, in reply:—

I submit *In re Batchelor* is exactly in point. It was a decision on *Vice-Chancellor Malins' Act* (20 & 21 Vict. c. 57), which is in substantially the same terms as sect. 77 of the *Fines and Recoveries Act* (3 & 4 Will. 4, c. 74). And in *Cooper* v. *Macdonald* (3) the question as to the effect of the concurrence of a bankrupt husband in his wife's disposition was distinctly raised and discussed. As to the decision in *In re Bright's Settlement* (4), doubts were certainly thrown upon it by the Master of the Rolls in *Palmer* v. *Locke* (5).

CHITTY, J:—

The question which arises on this petition is of this nature. *Mary Dicks*, the wife of *William Dicks*, was entitled in reversion under a will, which came into operation in 1862, to a share of the proceeds of real estate directed to be sold after the death of the tenant for life, who died on the 17th of January, 1869.

(1) Law Rep. 16 Eq. 481.
(2) 22 L. J. (Ch.) 717.
(3) 7 Ch. D. 288.
(4) 13 Ch. D. 413.
(5) 18 Ch. D. 381.

Before the death of the tenant for life, and before any dealings with *Mary Dicks'* share, her husband, *William Dicks*, in 1862 executed a deed for the benefit of his creditors under the provisions of the *Bankruptcy Act*, 1861. I need not state the deed, which is in the statutory form, and the effect of it is clearly shewn by sects. 192 to 200 of the Act of 1861, particularly by sect. 192. In substance, I take it that the deed had neither more nor less effect, so far as the property of the debtor and the rights of parties were concerned, than bankruptcy itself would have had. Then, after that, namely, in August, 1866, *William Dicks* was made bankrupt under the Act of 1861, and an assignee was appointed; and in December of the same year the bankrupt obtained his discharge. Then, after the death of the tenant for life, and before the sale had taken place, by the deed of the 11th of February, 1869, to which *Dicks* and his wife were parties, and which was duly acknowledged by the wife under the *Fines and Recoveries Act*, a mortgage was made of the wife's share under the will in favour of the Petitioner *Scriven*.

I have now stated the facts sufficiently to shew what is the point raised. The point is this, whether the deed of 1862 or the bankruptcy of 1866 precluded the husband from concurring in the deed of the 11th of February, 1869. It appears to me that this question is entirely covered by two decisions. The first is that in *In re Batchelor* (1), before the Lord Chancellor. That decision was on the effect of the Act known as *Vice-Chancellor Malins' Act*. But the language of that Act and that of the 77th section of the *Fines and Recoveries Act* are, for all purposes material to the present case, identical. What the Lord Chancellor says is this:—[His Lordship then read the passage from the judgment (2) commencing—"I am of opinion that by an assignment duly made under this statute," and ending (3), "did not estop the husband in equity from concurring with his wife in such a deed executed by her under this statute," and continued:—] The principle of the Lord Chancellor's decision is, that under *Vice-Chancellor Malins' Act* the disposition is the disposition of the married woman herself. The case before me falls

(1) Law Rep. 16 Eq. 481. (2) Law Rep. 16 Eq. 484.
(3) Law Rep. 16 Eq. 485.

CHITTY, J. 1883 *In re* JAKEMAN'S TRUSTS.

under the *Fines and Recoveries Act*, and it has been decided in *Briggs* v. *Chamberlain* (1) that the married woman can dispose under that Act of her interest in the proceeds of sale of real estate. There is, therefore, no distinction in principle between the two Acts as regards the disposition of the wife.

Then the Lord Chancellor goes on to say (2), "It would doubtless have been otherwise if he (the husband) had himself previously dealt with his *jus mariti* in this legacy by any deed or contract for value; but the right claimed by the executors exists, if at all, by operation of law only, and not by any manner of contract." That is a *dictum* and a *dictum* only; and what I think the Lord Chancellor means is that it would doubtless have been otherwise if the husband had entered into some contract that he would not concur with his wife, for his Lordship ends the sentence with the words "not by any manner of contract," that is, some contract on the husband's part which might prevent him from concurring. The words might also apply to a case where the husband had dealt specifically with his interest in the fund, but in the case before the Lord Chancellor there was no difficulty of that kind, because there had been no dealing of any sort by the husband with the fund.

But in *Cooper* v. *Macdonald* (3) the Master of the Rolls had, in effect, this very question to decide. There a married woman was tenant in tail to her separate use; but obviously, according to the *Fines and Recoveries Act*, she could not enlarge her estate tail into a fee simple except under the statute, and not under the statute without the concurrence of the husband. In that case the husband had been bankrupt, and after his order of discharge he joined with his wife in barring her estate tail. It was argued that his bankruptcy had precluded him from joining in the disentailing deed. The effect of the decision in the case was this: the married woman having, with the concurrence of her husband, barred her estate tail and thus enlarged it into a fee simple, was enabled, as the result of that disposition, to devise the property by will, so that the concurrence of the husband enabled the wife alone to defeat the estate by the curtesy which he would other-

(1) 11 Hare 69. (2) Law Rep. 16 Eq. 485.
(3) 7 Ch. D. 288.

wise have had. This being the effect of the husband's concurrence in the wife's deed, the Master of the Rolls held, and his decision was affirmed by the Court of Appeal, that the husband was not precluded by reason of his bankruptcy from joining in the deed. It appears to me that this decision applies directly to the case before me, and that there is nothing in the circumstances here which serves to make any material distinction between that case and this.

I have already disposed of the argument that there is a difference between a deed executed in favour of creditors and a bankruptcy: it appears to me that they both stand on the same footing. The result, therefore, is this: that a deed of this kind, under which the wife is, as Lord *Selborne* pointed out, the real disposing party, is an operative deed in favour of her assignees. It would be a strange thing, in my opinion, if the bankruptcy of the husband could take away from the wife the statutory power conferred upon her of disposing of that which is her own property. No doubt there is a peculiarity in this case, because, though the interest of the wife was one which was capable of being disposed of under the *Fines and Recoveries Act*, yet for all general purposes, it was a *chose in action*—it was an interest in personalty. But marriage does not operate as an absolute gift of the wife's *chose in action*, it merely operates as a qualified gift, the condition being that the husband shall reduce it into possession. Here the husband did not reduce it into possession. He only has the qualified interest, whatever it may be, and then comes in the statutory power. It seems to me, therefore, that the assignment by the deed of the 11th of February, 1869, is valid.

Then it is said that the case of *Hole* v. *Escott* (1) before Lord *Cottenham* is inconsistent with the decision in *Cooper* v. *Macdonald* (2). I do not think it is. If it is, *Cooper* v. *Macdonald* is the later case, and it is also the decision of the Court of Appeal. But in *Hole* v. *Escott* the Lord Chancellor had only to consider the question whether the husband could join with his wife in the execution of a power conferred upon her by deed. In that case it was the disposition of the husband as well as of the wife, and the Lord Chancellor held that the prior bankruptcy of the

(1) 4 My. & Cr. 187. (2) 7 Ch. D. 288.

CHITTY, J. 1883 *In re* JAKEMAN'S TRUSTS.

husband precluded him from joining in a disposition of property to which, if he had not been bankrupt, he would have been entitled. That case, therefore, is different from the case before me, because here it is the property of the wife which is being disposed of, property over which, as I have said, she had a statutory power of disposition. Comments have been made upon the decisions in *In re Bright's Settlement* (1) and *Palmer* v. *Locke* (2). It is not for me to say whether *In re Bright's Settlement* was rightly decided; but on reading the judgment of the Master of the Rolls in *Palmer* v. *Locke* it will be seen that he did not consider that the case of *In re Bright's Settlement* had received all the attention which it required. The attention of the Court of Appeal does not appear to have been directed to the language of the 141st section of the *Bankruptcy Act* of 1849, and the previous legislation out of which that particular section had grown. If it had I think the Court of Appeal would have held that the particular words of the 141st section upon which reliance was placed in *In re Bright's Settlement* related to debts and to debts only. It is not necessary for me to say more upon that case, but I think I have said enough to shew that it has no bearing upon the question before me.

Upon all these grounds I am of opinion that the acknowledged deed of the 11th of February, 1869, is good against the trustee of the creditors' deed and the assignee in bankruptcy. The other subsequent incumbrances will take effect according to their dates.

There will, therefore, be a declaration that neither the trustee of the creditors' deed nor the assignee in bankruptcy is entitled to any part of the fund in Court; and I order the fund to be divided amongst the incumbrancers, commencing with the deed of the 11th of February, 1869, according to priority of date.

Solicitors: *Brundrett, Randall, & Govett; Ullithorne, Currey, & Villiers; R. Metcalfe,* agent for *C. C. Becke, Northampton.*

(1) 13 Ch. D. 413. (2) 18 Ch. D. 381.

G. I. F. C.

PENRICE *v.* WILLIAMS.

CHITTY, J.

1883

March 5.

[1881 P. 177.]

Practice—Arbitrator—Order of Reference—Production of Documents—Jurisdiction—Rules of Court, 1875, *Ord. xxxi., r.* 12—"*Matter in question in the action*"—*Liberty to apply, Omission of.*

An order was taken by consent in an action referring the action and all matters in difference to the award of an arbitrator named in the order. The order provided that the parties should produce before the arbitrator all documents in their or either of their custody or power relating to the matter in difference; also that the party in whose favour the award should be made should be at liberty, after the service of a copy of the award on the other party, to apply for final judgment in accordance with the award. The Plaintiff having during the pendency of the arbitration applied by summons in the action under Rules of Court, 1875, Ord. xxxi., r. 12, for an affidavit of documents, the application was dismissed on the ground, (1) That in consequence of the order of reference the Court had no jurisdiction to grant the application, not having before it "any matter in question in the action" within the meaning of the rule; and (2) that under the order the whole jurisdiction as to discovery was in the hands of the arbitrator.

The rule that an order of the Court carries with it "liberty to apply," though not expressly reserved, only applies where the order is one not of a final character.

Adjourned summons.

The action was by a riparian owner for an injunction to restrain the Defendants from constructing a weir so as to impede the flow of water in a brook, and for damages. The Defendants counterclaimed.

By the consent of the parties an order was made by his Lordship in Chambers, on the 26th January, 1883, referring the action and all matters in difference between the parties to the award of an arbitrator therein named. The arbitration being still pending, the Plaintiff took out a summons under Rules of Court, 1875, Order xxxi., rule 12, for an affidavit and inspection of documents in the possession of the Defendants.

The order of reference provided (par. 5), that the costs of the action and the costs of the reference and award should abide the event: (par. 6), that the arbitrator might, if he thought fit, examine the parties to the action and their respective witnesses upon oath

CHITTY, J. 1883 PENRICE v. WILLIAMS.

or affirmation: (par. 7), that the parties should produce before the arbitrator the pleadings in the action, and all books, deeds, papers and writings in their or either of their custody or power relating to the matters in difference; and (par. 12), that unless restrained by any order of the High Court of Justice, or any Judge thereof, the party or parties in whose favour the award should be made should be at liberty, within seven days after service of a copy of the award on the solicitor or agent of the other party, to apply for final judgment in accordance with the award, and for all costs which he or they might be entitled to under the order and under the award, together with the costs of the judgment.

Upon the summons coming on to be heard in Chambers, the Defendants raised the objection that the order of reference had deprived the Court of any further jurisdiction in the action. The summons was then adjourned into Court for argument.

W. D. Benson, for the Plaintiff, in support of the summons:—

The rights of the parties with reference to discovery are not concluded by an order referring the action to arbitration: *Street* v. *Rigby* (1).

[CHITTY, J.:—The plaintiff there filed a bill of discovery against his partner with reference to the accounts of the partnership, and Lord *Eldon* merely decided that, although the articles of partnership contained a clause referring all disputes to arbitration, yet the plaintiff had not bargained away his right to file a bill of discovery.]

Paragraph 12 of the order shews that the Court was to retain control of the action. But whether this be so or not, the order cannot be said to be final. For although the order does not in express terms reserve "liberty to apply" at any period of the action, the absence of these words does not preclude the Plaintiff from applying to the Court; or leave may be given to amend by adding the words: *Daniell's* Chancery Practice (2).

Brynmôr Jones, for the Defendants:—

The sole question is, whether there is remaining before the Court "any matter in question in the action" within the meaning of Order XXXI., rule 12. In *Wimshurst* v. *Barrow Ship-*

(1) 6 Ves. 815.

(2) 6th Ed. p. 789, 790.

building Company (1), the cause having been referred to the Master under the *Common Law Procedure Act*, 1854, *Mellor* and *Field*, JJ., decided that the Court had no jurisdiction to give costs of proceedings subsequent to the order of reference, although the order itself was silent as to the costs, for such proceedings were not "proceedings in the High Court" within Order LV. Moreover, the order of reference itself confers on the arbitrator a jurisdiction as to discovery; and it may be assumed that the arbitrator would in his conduct of the arbitration adopt the practice of the *Judicature Acts* in respect to discovery so far as it was applicable to the circumstances of the case. The Plaintiff should therefore have made his application to the arbitrator, instead of endeavouring to abrogate an order to which he has given his consent.

CHITTY, J.:—

This is an application by the Plaintiff under Order XXXI., rule 12, asking that the Defendants may be ordered to make an affidavit of the documents in their possession, and the question has been raised as to the Plaintiff's right to such an order. The objection taken by the Defendants is that an order has been made by consent of the parties referring the action and all matters in difference to the award of an arbitrator; and it is said that the effect of this order is that there is no longer any action or question in an action pending before the Court, and therefore that the jurisdiction of the Court is exhausted. The order relied upon is an arbitration order containing the following usual clauses:—[His Lordship read paragraphs 5, 6, 7 and 12 of the order, and continued:—] The effect of this order is that, for all practical purposes, the action, so far as the Court is concerned, has disappeared in every respect except one. The exception is that the Court has to allow judgment to be entered up according to the award. The duty of the Court in this respect is of a purely ministerial nature. There is, therefore, so far as the Court is concerned, no "matter in question in the action" within Order XXXI., rule 12, and the power of the Court to make the order now asked for, or any other judicatory order, is gone.

(1) 2 Q. B. D. 335.

CHITTY, J.
1883
PENRICE
v.
WILLIAMS.

There is also a further objection taken by the Defendants, that the parties having, as is shewn on the face of the order itself, themselves agreed to place the whole jurisdiction with reference to discovery in the hands of the arbitrator, it was open to the Plaintiff to have made an application to the arbitrator, which he has not done. I am of opinion that this latter objection is also fatal. I therefore hold that on either of the two objections, independently of each other, the application must be refused.

Authority upon this question is not, however, wholly wanting.

In the case of *Wimshurst* v. *Barrow Ship-building Company* (1), the defendant having paid a sum into Court, it was at the trial agreed between the parties that judgment should be formally entered for the plaintiffs, subject to reference to a Master under the *Common Law Procedure Act*, 1854; and there was no provision in the order of reference that the judgment entered for the plaintiffs might be vacated and judgment entered for the defendants if the Master should find the amount paid into Court by the defendants sufficient. The result of the reference was in favour of the defendants; but upon an application by the defendants under Rules of Court, 1875, Order LV., for their costs of the reference—which by some slip had not been provided for in the order—the Court refused to accede to the application, on the ground that the parties having agreed in terms to a reference under the *Common Law Procedure Act*, 1854, the Court had no power to make an order for costs under Order LV., the reference not being "a proceeding in the High Court," within the meaning of that Order.

It is said, however, that this order cannot be said to be final, because—to use the words of Mr. Justice *Fry*, in *Fritz* v. *Hobson* (2), confirming a statement of the late Master of the Rolls—all orders of the Court carry with them *in gremio* liberty to apply to the Court, and such liberty should therefore be implied as existing in this order. With reference to what was said in that case with regard to liberty to apply, you must consider whether or no the order is one which can or cannot be worked out without any further order. There may be cases where liberty to apply would be granted, although the words had been omitted from a

(1) 2 Q. B. D. 335. (2) 14 Ch. D. 542, 561.

judgment order, when the order is clearly not of a final character, and also when there is necessarily something to be done irrespective of what appears on the face of the order. For instance, where a fund has been left in Court, and nothing has been said as to the disposition of the fund, or there is any other thing necessary to be done which has in no way been dealt with; in a case of that sort you could apply without a reservation in the order of liberty to apply; and it would be no answer in such a case to say that no liberty to apply had been reserved: for, if such an argument were carried a step further, a similar objection could be made in every case of an application to add the words "liberty to apply" to an order, namely, that no liberty to make an application had been reserved.

There is also no doubt that if the words "liberty to apply" were accidentally omitted from an order, the defect could be remedied under the slip order (Rules of Court, 1875, Order XLI. a).

I am, however, of opinion that the present arbitration order calls for no amendment in this respect, for the form of the order shews that the Court has no right to entertain any application until after award made.

I, therefore, dismiss the summons, with costs.

Solicitors: *Smith & Lawrence; Hacon & Turner,* agents for *J. Donague, Swansea.*

G. I. F. C.

PEARSON, J.
1883
April 14.

LYDNEY AND WIGPOOL IRON ORE COMPANY *v.* BIRD.

[1882 L. 1841.]

Practice—Security for Costs—Limited Company Plaintiffs—Time for making Application—Rules of Court, 1875, *Order* LV., *r.* 2—*Companies Act*, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 69 [*Revised Ed. Statutes, vol. xiv. p.* 218].

The old rule of the Court of Chancery, that an application for security for the costs of an action must be made promptly, is inconsistent with the provision of r. 2 of Order LV., that security for costs may be given "at such time or times" as the Court may direct, and must be taken to have been abrogated.

Held, therefore, that an application by a defendant for security for the costs of an action brought against him by a limited company might be made after reply and notice of trial.

ADJOURNED SUMMONS.

This action was commenced on the 7th of July, 1882, claiming from the Defendants *William Bird* and *James Bird* the payment of £10,000 which it was alleged that they had received as trustees on behalf of the company. The statement of claim was delivered on the 15th of July, 1882. The amended reply of the Plaintiffs to the amended statement of defence of the Defendant *James Bird* was delivered on the 15th of December, 1882. On the 29th of December, 1882, the Plaintiffs gave notice of trial. On the 12th of February, 1883, the Defendant *James Bird* took out a summons, asking that the Plaintiffs might be ordered to give security for the costs of the action. The Chief Clerk, on hearing the summons, thought that security should be given for £200. The hearing was adjourned into Court.

Swinfen Eady, for the summons :—

The application is made under sect. 69 (1) of the *Companies Act*, 1862.

(1) Sect. 69, "Where a limited company is plaintiff or pursuer in any action, suit, or other legal proceeding, any Judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be

[*Bunting*, for the company:—The application is made too late.]

The old rule of the Court of Chancery as to the time within which such an application ought to be made does not now apply: *Martano* v. *Mann* (1). It would be inconsistent with rule 2 of Order LV. (2) that the old rule should still exist. It is a matter in which the Court has a discretion, and here the evidence shews that the assets of the company will not be sufficient to pay the Defendant's costs if he succeeds in his defence.

Bunting, for the company:—

Rule 2 of Order LV. does not alter the old rule that a defendant waives his right to ask for security for costs if he does not ask promptly. The Court can increase the amount of the security from time to time: *Republic of Costa Rica* v. *Erlanger* (3); but the original application must be made promptly. The evidence is not such as to justify the application.

PEARSON, J.:—

The new rule was intended to do away with the injustice which was caused by the old system, and it is inconsistent with the old practice. If the Defendant may apply from time to time for an increase of the amount of the security, why may not his original application be made at any time? The old rule cannot apply, and this objection must be raised in another Court. If the company has really great difficulty in finding security for £200, I should come to the conclusion that it is practically insolvent. Looking at all the evidence together, I feel justified in saying that, if the company is not absolutely insolvent, yet if Mr. *Bird* should be successful in his defence, he would have a long time to wait for his costs, if indeed he should ever get them at all.

---

given for such costs, and may stay all proceedings until such security is given."

(1) 14 Ch. D. 419.

(2) Order LV., r. 2. "In any cause or matter in which security for costs is required, the security shall be of such amount, and be given at such time or times, and in such manner and form as the Court or a Judge shall direct."

(3) 3 Ch. D. 62.

PEARSON,J. 1883 LYDNEY AND WIGPOOL IRON ORE COMPANY v. BIRD.

That is just the kind of case which is contemplated by sect. 69 of the *Companies Act*. The Plaintiffs must give security for £200.

Solicitors for Defendants: *Munton & Morris.*
Solicitors for Company: *Learoyd & Co.*

W. L. C.

PEARSON,J. 1883 *April* 21.

In re DUMBLE.
WILLIAMS *v.* MURRELL.

[1877 D. 160.]

Will—Construction—Contingent Gift—Right to interim Income till happening of Contingency.

A testator devised his residuary real estate to trustees, on trust to pay the rents to his wife for her life, and upon her death to apply the rents for the maintenance of his daughter and to accumulate the surplus, and on the daughter attaining twenty-one to pay to her the accumulations and the future income for her life, and upon her death on trust to convey the residuary real estate unto and equally between all and every her child and children who should live to attain twenty-one, as tenants in common in fee. But in case his daughter should die without leaving any child or children who should attain twenty-one, then on trust to convey the residuary real estate to such person or persons as the daughter should by deed or will appoint. And by another clause the testator bequeathed his residuary personal estate to the same persons as trustees, on the same trusts as those declared of the real estate except the clause as to maintenance and accumulation.

The will contained no disposition of the income of the realty or the personalty during the suspense of vesting.

The daughter survived the testator and his wife, and died leaving an only daughter, who was an infant. The testator's daughter had, by her will, exercised the power of appointment in favour of other persons, in the event of her leaving no child who should live to attain a vested interest under the trusts of her father's will:—

Held, that the testator had in effect mixed up the whole of his property in one mass, and that the rule in *Genery* v. *Fitzgerald* (1) applied, and that consequently the *interim* rents of the real estate, until the happening of the contingency, as well as the *interim* income of the personalty, must be accumulated, and follow the destination of the *corpus*.

FURTHER CONSIDERATION.

This action was brought for the administration of the real and

(1) Jac. 468.

personal estate of *George Dumble*, who died on the 16th of November, 1848, and the carrying into execution the trusts of his will.

By his will, dated the 16th of December, 1844, the testator after bequeathing some specific and pecuniary legacies, and making a specific devise of real estate, devised the residue of his real estate unto and to the use of his wife, *Betsy Dumble*, and *James Horniblow* (whom he also appointed executors), their heirs and assigns, upon trust to pay the net rents and profits thereof unto or permit the same to be received by his wife for her life, for her separate use, and from and after her decease upon trust to apply the same rents and profits, or such part thereof as should be necessary for that purpose in the discretion of his said trustees, in and towards the maintenance and education of his daughter *Elizabeth Dumble*, and to accumulate the remainder thereof for her benefit until she should attain the age of twenty-one years; and, upon her attaining that age, upon trust to pay the aforesaid accumulations to his said daughter, and thenceforth to pay the said rents and profits unto or permit the same to be received by his said daughter for her life, for her separate use. And from and after her decease, upon trust to convey the same real estate and every part thereof unto and equally between and amongst all and every the child and children of his said daughter who should live to attain the age of twenty-one years, and their respective heirs, as tenants in common and not as joint tenants. But in case his said daughter should die without leaving any child or children who should attain the age of twenty-one years, then upon trust to convey the same real estate and every part thereof unto such person or persons, for such estate or estates, and in such parts, shares, and proportions, manner and form in all respects as his said daughter, whether covert or sole, and notwithstanding coverture, should by any deed or deeds or by her last will and testament duly executed direct, limit, or appoint, give or devise the same. And the testator directed his executrix and executor to collect and convert into money all and every part of his personal estate not thereinbefore disposed of, and invest the same in the securities therein mentioned in the names of his wife and *James Horniblow*. And the testator thereby directed that his wife and *James Horniblow* should stand possessed of and interested in his

PEARSON, J. 1883 *In re* DUMBLE. WILLIAMS *v.* MURRELL.

said personal estate and effects and the securities for the same, in trust to pay to or allow his wife to receive the annual produce thereof for her life for her separate use, and from and after her death upon further trust to pay the annual produce of the said trust moneys to his said daughter *Elizabeth Dumble* for her life for her separate use. And from and after the death of his said daughter upon further trust to pay and divide the aforesaid trust moneys, and the securities in and upon which the same might be invested, unto and equally between and amongst all and every the child and children of his said daughter who should live to attain the age of twenty-one years. But in case his said daughter should die without leaving any child or children who should live to attain the age of twenty-one years, then upon trust to pay the same trust moneys and securities unto such person or persons, in such parts, shares, and proportions, manner and form in all respects as his said daughter, whether covert or sole, and notwithstanding coverture, should by any deed or deeds or by her last will and testament direct or appoint, give or devise the same. The will did not contain any disposition of the rents and income of the testator's residuary real and personal estate after the death of his daughter *Elizabeth Dumble*, and during the minority of her child or children, or any provisions for the maintenance of such infant child or children.

The testator died on the 16th of November, 1848. He left his wife and his daughter *Elizabeth Dumble* surviving him, but he left no other child. The widow died on the 25th of January, 1864. *Elizabeth Dumble* on the 18th of June, 1863, married *C. N. Williams*. She attained the age of twenty-one on the 10th of December, 1863, and she died on the 3rd of February, 1866. The Plaintiff in this action was the only child of *Elizabeth Williams*, and was the heiress at law of the testator as well as of her mother. The Plaintiff was born on the 14th of May, 1864. *Elizabeth Williams* made her will, dated the 27th of January, 1865, and she thereby, in the event of her leaving no child who should live to attain a vested interest under the trusts of the will of her father, gave and devised all the real and personal estate over which she had any disposing power under or by virtue of his will unto the Defendants *Edward Murrell* and *C. N. Williams*, their

heirs, executors, administrators, and assigns, upon certain trusts therein mentioned. And she appointed *Murrell* and *Williams* her executors. The action was brought against *Murrell* and *Williams* (who had also then become the trustees of the will of *George Dumble*) to carry into execution the trusts of his will, and to administer his real and personal estate.

The main question on the present occasion was how the rents of the testator's residuary real estate was to be dealt with during the minority of the Plaintiff, or until her death, in case she should die under twenty-one. It was admitted that the income of the residuary personalty must be accumulated until it should be ascertained whether the Plaintiff or the appointees under her mother's will would become entitled to the capital, and that the accumulations must go with the capital. The question was whether the same rule was to be applied to the interim rents of the real estate.

Higgins, Q.C., and *Gaselee*, for the Plaintiff:—

The interim rents of the real estate are not to be accumulated, but must be treated as undisposed of, and they therefore go to the Plaintiff as heiress-at-law of the testator. The gifts of the realty and personalty are quite distinct, though they are made to the same persons as trustees, and the trusts are not identical. In the case of the personalty there is no trust, as there is in the case of the realty, for the maintenance of the testator's daughter during her minority: *Genery* v. *Fitzgerald* (1); *Hodgson* v. *Earl of Bective* (2); *Bellairs* v. *Bellairs* (3).

Cookson, Q.C., and *Blakesley*, for the Defendant *C. N. Williams*:—

It is well settled that in the case of a contingent gift of personalty the interim income until the happening of the contingency is to be accumulated, and is to follow the destination of the capital, and also that if there is a gift of a blended fund consisting of real and personal estate the interim rents must follow the interim income of the personalty; otherwise the same gift would be construed differently as to realty and personalty.

(1) Jac. 468. (2) 1 H. & M. 376.
(3) Law Rep. 18 Eq. 510.

PEARSON, J. 1883 *In re* DUMBLE. WILLIAMS *v.* MURRELL.

But this is a merely artificial rule which ought not to be extended. You are to look merely at the form of the gift, and if, as here, there are separate and distinct gifts of realty and personalty, there is not a blended fund within the meaning of the rule. In *Genery* v. *Fitzgerald* (1) the gift was in form of a blended fund. The mere circumstance that the realty and the personalty go to the same persons does not make a blended fund. In *Hodgson* v. *Earl of Bective* (2) the trusts of the residuary personal estate were declared by reference to those of the residuary real estate, and it was held that there was no blending, and that the heir-at-law was entitled to the intermediate rents. That case governs the present. The judgment of Vice-Chancellor *Wood* (3) is conclusive against the notion of there being any blending here. When each gift is in itself a complete disposition—a will, so to say, in itself—how can it be said that there is any blending so as to introduce the artificial rule? But, in truth, the beneficial dispositions of the realty and the personalty are not identical.

Cozens-Hardy, Q.C., and *Stallard*, for the appointees under the daughter's will:—

If there is anything artificial it is in the distinction between real and personal estate. But the question is whether on the will, taken as a whole, an intention is manifested that the two funds should go together. It is not necessary that the two funds should be given by the same clause in the will. *Genery* v. *Fitzgerald* was not a true case of blending. The rule is explained in *Bellairs* v. *Bellairs* (4), and in that case *Jessel*, M.R., said (5) that the rule is not confined to the case of a "true mixed fund," but that it applies to "a simple gift of realty and personalty to the same object." *Hodgson* v. *Earl of Bective* was a different case from the present, and in it Vice-Chancellor *Wood* considered the test to be whether the testator had "mixed up the whole of his property in one mass." The true test is, not whether the limitations are contained in the same

(1) Jac. 468.
(2) 1 H. & M. 373.
(3) 1 H. & M. 397.
(4) Law Rep. 18 Eq. 510.
(5) Law Rep. 18 Eq. 517.

clause of the will, but whether the gifts are to the same objects beneficially. In the present case the only difference between the trusts of the realty and the personalty is in the provision for the maintenance of the testator's daughter during her minority, but that is immaterial. The equitable interests are in substance identical, and the principle of *Genery* v. *Fitzgerald* (1) applies.

PEARSON, J.:—

To my mind this is a new question, and I should have been much better pleased if I could have found some distinct authority directing me how to decide it. With regard to general principles, there is no doubt, and there has been no dispute between the counsel who have argued the case. If you find in one and the same clause in a will a gift of realty and personalty to go together to the same objects, then the rule is, that, if there are intermediate rents of the realty and intermediate income of the personalty which are not expressly disposed of, the rule with regard to personalty is followed, and the rents of the real estate must be accumulated in the same way as the income of the personal estate, so as to go to the person who ultimately becomes entitled to the two funds. So also if there be a gift of mixed realty and personalty, such, for instance, as a gift of a blended fund eventually composed partly of the proceeds of the sale of realty and partly of personalty, in that case, again, there is no dispute that the rule with regard to personalty must be followed, and that the intermediate income of the proceeds of the realty must be accumulated in the same way as the intermediate income of the pure personal estate. But I have here a case which is neither one nor the other of these entirely. I have a will by one clause of which the real estate is given to trustees, and under one set of limitations the real estate is disposed of. By another clause the personal estate is given to the same trustees, and under another set of limitations the personal estate is disposed of. But the limitations of the real estate and the limitations of the personal estate are substantially the same, almost the same in words, but substantially and for all practical purposes I hold them to be the same. It so happens that there is an interval during which there

(1) Jac. 468.

PEARSON,J. 1883 *In re* DUMBLE. WILLIAMS *v.* MURRELL.

is no person having a vested interest under the will, and, inasmuch as the gifts are both residuary, the question arises as to what is to be done with the intermediate rents of the real estate pending the happening of the contingency. There is no dispute that the intermediate income of the personalty must be accumulated. The question is whether the rule in *Genery* v. *Fitzgerald* (1) is to be followed, or whether the testator's heiress-at-law takes the intermediate rents.

Now the only authorities which have been cited (and I have no doubt they are the only authorities which really bear upon the case) are *Genery* v. *Fitzgerald*, *Hodgson* v. *Earl of Bective* (2), and *Bellairs* v. *Bellairs* (3). *Genery* v. *Fitzgerald* is a case in which in one and the same clause realty and personalty were disposed of, going to one and the same object, and Lord *Eldon* said (4): "When personal estate is given to *A.* at twenty-one, that will carry the intermediate interest. If a testator gives his estate *Blackacre* at a future period, that will not carry the intermediate rents and profits. But when he mixes up real and personal estate in the same clause, the question must be, whether he does not shew an intention that the same rule shall operate on both. Here the property was partly real, partly personal, and partly of such a description that the testator does not seem to have known whether it was real or personal. He does not by his will create any trust, but makes a legal devise and bequest of the whole together: then is not the weight of authority in favour of the proposition, that when real and personal estate are given in this way, the intermediate profits of both must go together? I think it is."

That was followed by *Hodgson* v. *Earl of Bective*, in which there were gifts of realty and personalty by different clauses, and it must be said that on the whole the clauses were not identical, that the personal estate did not go entirely in the same way as the real estate, and I think that must be what Vice-Chancellor *Wood* is referring to in the passage which I shall presently read from his judgment. He says (5), "It is said, and no doubt there is much weight in the observation, that, as you

(1) Jac. 468.
(2) 1 H. & M. 376.
(3) Law Rep. 18 Eq. 510.
(4) Jac. 470.
(5) 1 H. & M. 396.

find it held that a general gift of all real and personal estate to certain intents, uses, and purposes is to be read as manifesting the intention that the rents and profits are to pass exactly in the same manner as the income of the personal estate passes, and that the heir is thereby to be deprived of the benefit of the rule laid down in the cases I have referred to, it would seem singular to say that the mere circumstance of the testator dividing the will into two parts, and disposing of the real estate in one clause, and of the personal estate in another, should be held to lead to a different conclusion. But I do not think that this reasoning is sound." If I were to stop there, and if there was no more in the judgment, I should certainly come to the conclusion, if I may say so, that there was something more than an *obiter dictum* against applying the rule in *Genery* v. *Fitzgerald* (1) to a case where there were gifts of realty and personalty by two distinct gifts of a will, whereas in *Genery* v. *Fitzgerald* the gift was contained in one clause only. But I think the Vice-Chancellor explains what he means when he proceeds to say, "The rule which gives intermediate rents to the heir is the artificial result of our peculiar doctrines in this country in favour of the heir's position; and, though the Courts have considered that, where a testator has distinctly and clearly in his will mixed up realty and personalty in one fund, he must be taken thereby to have indicated an intention that they should go in the same way; that reasoning does not apply to a case where he has carefully and deliberately isolated the two properties, giving precise limitations as to the one in one portion of the will, and precise limitations as to the other in another portion of his will; and where, as in this case, he was plainly not contemplating any such complete mixture at all, because the first operation which he directs as to the personalty is to divide it into three several parts, and give two-thirds to the one class of objects of his bounty, and one-third to the other. There is nothing on the face of the will which in the least can justify me in saying that the testator has mixed up the whole of his property in one mass, so as to bring the case within the rule in *Genery* v. *Fitzgerald*." I think, therefore, that when the Vice-Chancellor said, "I do not think that this reasoning is sound," he was applying himself, as most Judges would do when

(1) Jac. 468.

PEARSON, J. 1883 *In re* DUMBLE. WILLIAMS *v.* MURRELL.

they are delivering judgments in a particular case, to the particular circumstances of the case before him, and was not intending to lay down as a general rule that in all cases where the trusts of the realty and the trusts of the personalty are to be found on two different pages of the will, the intermediate income of the realty and that of the personalty are governed by different rules, even if the trusts are identically the same, giving the property in all events to the same persons. But, when you find two trusts of realty and personalty, the one on one page and the other on another page of the will, but the trusts of the personalty are not identical with those of the realty, but may or may not carry the property to the same class of persons, then the Vice-Chancellor says that the testator has not mixed up the whole of his property in one mass.

When I come to the case of *Bellairs* v. *Bellairs* (1), if I take the words of *Jessel*, M.R., literally they appear to me to decide the present case in Mr. *Cozens-Hardy's* favour. *Jessel*, M.R., said (2), "The rules as to mixed funds are very different from the rules governing simple funds, arising from one or the other kind of property. The general rule in modern times has been to govern this mixed fund by the rules of personalty, and in some cases it has been carried so far that even where the only mixture, so to say, was giving the funds to the same objects, that has been carried out." If I were to stop there I should say that the words are large enough to cover the present case completely, and to shew that, inasmuch as the same objects are to take both the realty and the personalty, the rule with regard to the intermediate income of personalty must prevail. Then the Master of the Rolls refers to *Genery* v. *Fitzgerald* (3), and proceeds (4), "That was not the case of a true mixed fund, but a simple gift of realty and personalty to the same object. When we come to true mixed funds we find the law has been largely modified in favour of the rules regulating personal estate, as is shewn by the decisions in the well-known cases of *Roberts* v. *Walker* (5); *Boughton* v. *Boughton* (6); *Tench* v. *Cheese* (7). Therefore, if it depended simply on

(1) Law Rep. 18 Eq. 510.
(2) Ibid. 516.
(3) Jac. 468.
(4) Law Rep. 18 Eq. 517.
(5) 1 Russ. & My. 752.
(6) 1 H. L. C. 406.
(7) 6 D. M. & G. 453.

this consideration, I should be bound to hold that, having a mixed fund, you are not to sever it into two, and say it is valid as to so much as arises from realty, and invalid as to so much as arises from personalty, but to hold that the two funds are to be kept together, and that the rules as to personal estate apply." That sentence seems to me to shew that the Master of the Rolls was thinking of a case in which there is really and truly a gift contained in one clause and in one clause only.

In dealing, therefore, with the present case, I must consider what is the rule to be gathered from these authorities I think the test must be taken from the judgment of Vice-Chancellor *Wood*, where he says, "There is nothing on the face of the will which in the least can justify me in saying that the testator has mixed up the whole of his property in one mass." The question which I have to determine is, Has this testator or has he not mixed up the whole of his property in one mass? No doubt there are two trusts of the realty and the personalty, but the trusts are the same, and the objects are the same. There is nothing whatever to distinguish them from one trust, except that in words there are two trusts, one on one page of the will, and the other on another page. No one can read the will and doubt that the testator intended the whole of his residuary realty and the whole of his residuary personalty to go together to the same objects of his bounty, and in no other way. I come, therefore, to the conclusion that this is really a case in which the testator, although under two trusts, has mixed up the whole of his property in one mass, and that consequently the rule in *Genery* v. *Fitzgerald* (1) applies, and the intermediate rents of the real estate must follow the same rule as the intermediate income of the personal estate.

Solicitor for Plaintiff: *G. Beetham Batchelor*, agent for *W. M. Armstrong, Hertford.*

Solicitors for Appointees: *Petgrave & Hodgkinson.*

(1) Jac. 468.

W. L. C.

C. A.
1883
April 3.

In re PHOTOGRAPHIC ARTISTS' CO-OPERATIVE SUPPLY ASSOCIATION.

Company—Winding-up Order—Appeal by Company—Security for Costs.

Where a limited company alone appeals from a winding-up order without joining any one personally responsible for costs, it will generally be ordered to give security for costs.

THE *Photographic Artists' Co-operative Supply Association* was incorporated as a company with limited liability on the 5th of May, 1877. On the 31st of August, 1882, *A. H. Loring* presented a petition to wind up the company. The petition alleged that the Petitioner was an unsecured creditor for £100, of which he could not obtain payment, as the banking account of the company was overdrawn, and a debenture holder for £1000, and also a holder of 640 fully paid-up £10 shares. That about 1170 shares had been issued and allotted, and about £10,500 paid up. That the capital had been spent, and that beyond the uncalled capital and some machinery and stock-in-trade the company had no money to carry on its business, and that there were creditors amounting to about £2000. That no profits had been made, and that the balance sheet each half-year shewed a continuing and increasing loss. That under these circumstances the company was unable to carry on its business and discharge its liabilities, and that it was just and equitable that it should be wound up.

On the 5th of September, 1882, *F. Whinney* was appointed provisional official liquidator.

On the 15th of February, 1883, Mr. Justice *Chitty* made a winding-up order, being of opinion that if the company were now wound up there might be enough to pay the creditors in full, but that if it went on there would not. The company appealed. The Petitioner thereupon gave notice of motion that the company might be ordered to give security for £50, or such sum as might be considered sufficient to answer the costs of the appeal.

Davey, Q.C., and *Boome*, for the application.

Ince, Q.C., and *R. Bramwell Davis*, *contrà* :—

If the appeal were dismissed the Respondents would have their costs out of the assets, as was ordered in *In re National Savings Bank Association* (1), which decision was recognised in *In re Diamond Fuel Company* (2). The Court can give these costs in priority to any other demands: *Companies Act*, 1862, s. 110; *Buckley* on Joint Stock Companies (3). The assets are amply sufficient to pay any costs which the Respondents can incur, and no security is requisite.

BAGGALLAY, L.J. :—

This is an application for security for the costs of an appeal from an order of Mr. Justice *Chitty* for winding up a company. The company is the sole Appellant, and I am of opinion that security ought to be given. It is suggested that if the appeal were dismissed the proper course would be to give the costs of the Respondent out of the estate and make no order as to the costs of the Appellant company, and that, therefore, no security is necessary, the assets being abundantly sufficient to pay the costs thus to be ordered out of them. I think that it would be wrong to accede to this argument. It may be true that the assets would be sufficient to pay the costs; but, if sufficient be not left to pay the creditors in full, the creditors would be practically paying the costs. I think that the general rule, according to the *dictum* of Lord Justice *James* in *In re Diamond Fuel Company*, is that where the company appeals from a winding-up order security for costs must be given. To adopt any other view would encourage frivolous appeals.

COTTON, L.J. :—

I also think that security ought to be given. This is a limited company, and an order for winding it up has been made on the ground that it cannot pay its debts. We must therefore consider that a *primâ facie* case of insolvency has been established, in which case, according to the general rule, security for costs ought

(1) Law Rep. 1 Ch. 547. (2) 13 Ch. D. 400.
(3) 4th Ed. pp. 222, 264.

C. A. 1883 *In re* PHOTOGRAPHIC ARTISTS' CO-OPERATIVE SUPPLY ASSOCIATION. Cotton, L.J.

to be given. But it is said that the costs could be dealt with under sect. 110, and that the Respondents therefore run no risk. That, no doubt, is so, but as we have power to prevent the costs falling on the assets, ought we not to exercise it? In the cases referred to no application for security had been made, and the appeal being unsuccessful, the Court did the best thing it could, which was to give the Respondents their costs out of the assets. But when we have an opportunity we ought to order security to be given, for it is not just that any costs occasioned by an unsuccessful appeal from a winding-up order should be thrown upon the assets to the prejudice of the creditors when we have the means of preventing it. It is our opinion that where an order has been made for winding up a company on the ground that it cannot pay its debts, and the company alone appeals, there as a general rule security for costs ought to be ordered.

Security was ordered to the extent of £25, the costs of the application to be costs in the appeal.

Solicitors for Petitioner: *Barnard & Co.*
Solicitors for company: *A. R. & H. Steele.*

H. C. J.

C. A. 1883 *April* 10.

In re ALCOCK. PRESCOTT *v.* PHIPPS.

[1882 A. 1960.]

Mortgagee—Suit to enforce Security—Notice to pay off Mortgage Debt.

A son who was residuary legatee under his father's will mortgaged his interest under that will to *H.* The son died having made *P.* his executor and *A.* his residuary legatee. *A.*, as residuary legatee, and *H.*, on behalf of himself and the other creditors, brought an action against the executors of the son for administration of the son's estate, and *H.* brought an action against the executors of the father for administration of the father's estate. Shortly after this *P.* gave notice to *H.* that he should pay off the mortgage in six calendar months, and this notice was accepted by *H.*:—

Held, that notwithstanding the giving and acceptance of the notice, *H.* having taken proceedings to recover his mortgage money was bound to

accept in satisfaction of his claims his principal money and costs with interest up to the time of payment, though such payment was made before the expiration of the notice.

HENRY ALCOCK the son, the testator in this action, was residuary legatee under the will of *Henry Alcock* the father. *H. Alcock* the son mortgaged his interest under his father's will to *G. G. Houghton*, to secure £6000 with interest at £5 per cent., and died in November, 1882, leaving a will by which he appointed the Defendant *Phipps* and one *Birch*, who was in *Australia*, his executors, and, after giving large legacies, bequeathed the residue to *Walter Alcock*.

On the 5th of December, 1882, *Phipps* commenced an action against *Walter Alcock* for the administration of the estate of *H. Alcock* the son, and on the following day *Walter Alcock*, as residuary legatee, and *Houghton*, as a creditor under the mortgage deed, on behalf of himself and all other creditors of *H. Alcock* the son, commenced an action against *Phipps* for administration of the same estate. On the 8th of December, 1882, the action of *Prescott* v. *Phipps* was commenced against *Phipps* for administration of the same estate, and on the 13th of December, 1882, a decree for administration was made in it. Early in January, 1883, an order was made in the three actions giving the conduct of the proceedings to *W. Alcock* and *Houghton*. Shortly after this *Houghton*, on the 16th of January, 1883, commenced an action of *Houghton* v. *Birkbeck* against the executors of *Henry Alcock* the father, for the administration of the estate of *Henry Alcock* the father. On the 15th of February, 1883, *Phipps* gave notice to *Houghton* that his mortgage would be paid off at the expiration of six calendar months from the date of the notice.

On the 26th of February, 1883, *Phipps* took out a summons in *Prescott* v. *Phipps*, asking that he might be at liberty to sell £2173 railway stock belonging to the estate of *H. Alcock* the son, and to raise by a deposit of part of certain bank shares belonging to the same estate such a sum as with the proceeds of the stock would be sufficient to pay *Houghton* his principal, interest, and costs; and for this purpose, if it should be necessary, to pay *Houghton* interest in lieu of notice. This summons was adjourned into Court, and on the 12th of March Mr. Justice *Chitty* made an

C. A. 1883 *In re* ALCOCK. PRESCOTT *v.* PHIPPS.

order giving *Phipps* liberty to pay *Houghton* the principal, interest, and costs due to him as mortgagee, and for that purpose to sell the railway stock and borrow on deposit of a portion of the testator's bank shares a sum which with the proceeds of the railway stock would be sufficient to pay *Houghton* his principal, interest, and costs. His Lordship expressed the opinion that, according to *Letts* v. *Hutchins* (1), *Houghton* having commenced an action to recover his mortgage money was not entitled to six months' notice, but was bound to accept at any time principal, costs, and interest up to the time of payment. The order, however, did not contain anything on the point what interest could be claimed, and the notice given by *Phipps* was not called to his Lordship's attention.

Walter Alcock and *Houghton* appealed.

Ince, Q.C., and *Beddall*, for the appeal:—

Walter Alcock is the person principally interested in this question, and he considers that the immediate paying off this mortgage is calculated to cause useless expense and a loss to the estate. The executor asked leave to pay off with six months' interest if necessary. This would have been a certain loss to the estate, and the order now leaves it uncertain whether the mortgagee if paid off at once is not entitled to interest up to the expiration of the six months' notice.

[The COURT observed that *Houghton* was not a party to the proceedings as mortgagee, but only as a creditor of *H. Alcock* the son, and suggested that he should submit his rights as mortgagee for decision, so that the question as to interest might be determined. This was acceded to.]

The notice given to the mortgagee and adopted by him made a bargain which did away with the effect of his having taken proceedings which amounted to a demand of payment. He must be presumed to have made arrangements on the faith of the money being paid at the expiration of the notice and not before, and he ought to receive interest up to the expiration of the notice whether he is paid off at or before that period.

(1) Law Rep. 13 Eq. 176.

Romer, Q.C., and *Rawlinson, contrà*, were not called upon.

BAGGALLAY, L.J.:—

It is not desirable that appeals of this nature should be brought, the only question being whether it is for the benefit of the testator's estate that a mortgage made by him should be discharged in a certain way. This is eminently a matter within the discretion of the Judge before whom the administration of the estate is proceeding, and we should not readily interfere with that discretion. It is urged that *Walter Alcock*, being residuary legatee, is the person whose wishes ought to be consulted, but the testator appointed Mr. *Phipps* executor, and entrusted the administration of the estate to him, and the order of which the residuary legatee complains has been made on the application of the executor. Appeals from such orders are to be discouraged, but in the present case there is an advantage to both parties in having the question as to interest decided so as to be binding on *Houghton* in his character of mortgagee. We think that the right order will be to declare that the mortgagee is bound to accept in satisfaction of his security his principal and costs, with interest up to the time of payment, though made within the six months; to this he is bound by reason of his having commenced proceedings to enforce payment, and he is in no way relieved from this obligation by the notice served upon him; he must also undertake to consent to an order in *Houghton* v. *Birkbeck* staying all proceedings in that action upon payment of his costs in that action and of his principal money and interest up to the time of payment. With these additions the order of Mr. Justice *Chitty* will stand.

COTTON, L.J.:—

I am of the same opinion, and have nothing to add to what Lord Justice *Baggallay* has said as to its not being right to encourage appeals from the discretion of the Judge below as to proceedings in an administration suit. I think that we ought not to interfere with the direction that Mr. *Phipps* shall be at liberty to pay off the mortgage in the way proposed. It is, however, desirable for all parties that there should be a decision as to the amount of interest to which the mortgagee is entitled.

C. A.
1883
In re ALCOCK.
PRESCOTT *v.* PHIPPS.
Cotton, L.J.

It is admitted that as he has taken proceedings to call in his mortgage money he must (if the notice to pay him off in six months had not been given) have accepted interest up to the time of payment, and could not have claimed any interest in lieu of notice. But it is urged that the giving the notice to pay off the mortgage in six months, and the acceptance of that notice by the mortgagee, made an agreement that the mortgage should be paid off at the expiration of six months and not before, and gave the mortgagee a right to interest for that period. But the mortgagee could not help accepting the notice, and I do not see how his accepting it could alter his rights. It is said that he may have altered his arrangements as to the money in consequence of his having received the notice. If it had been proved that he had done so, we should have been ready to listen to any argument founded upon that. I do not say what the result would have been, but no such case has been proved, and we cannot assume its existence for the purpose of taking away the right which the institution of proceedings by him to enforce his security gave to the mortgagor to pay him off without six months' notice or interest in lieu of notice.

Solicitor for Appellants: *C. N. Longcroft.*
Solicitors for Respondent: *Walters, Deverell, Walters, & Wood.*

H. C. J.

In re BROWN.
WARD *v.* MORSE.

[1878 W. 474.]

C. A.
1883
CHITTY, J.
Feb. 20.
C. A.
April 13.

Practice—Claim—Counter-claim—Costs where both succeed—Apportionment of Costs.

When the Plaintiff's claim and the Defendant's counter-claim have both been successful, the Plaintiff, in the absence of any special directions to the contrary, is entitled to the general costs of the action, notwithstanding that the result of the litigation is in favour of the Defendant. There will be no apportionment of such costs as would have been duplicated had the counter-claim been the subject of an independent action, but the Plaintiff is not to recover as costs of the action any costs fairly attributable to the counter-claim.

The decision of *Chitty*, J., affirmed.

THIS was an appeal from a decision of Mr. Justice *Chitty*, refusing an application made on behalf of the Defendant to review the Master's taxation.

An order had been made by Mr. Justice *North* in Chambers, on the 19th of April, 1882, referring it to the Taxing Master to tax, first, the costs of the present Plaintiffs and of the original Plaintiff, *John Brown*, of the action of *Ward* v. *Morse*, including the costs of the transfer thereof to the Chancery Division, and to tax, secondly, the costs of the Defendant *Morse* of his counter-claim in the said action, and of his claim against the estate of the above-named testator, including therein the costs reserved by a particular order mentioned, and it was ordered "that the amount of the first mentioned costs be set off against the amount of the second mentioned costs, and the balance added to or deducted from the amount found to be due to the Defendant as a creditor of the testator."

The above-mentioned order was made under the following circumstances:—

John Brown, the testator, was a contractor engaged in constructing a railway; the Defendant *Morse* was a sub-contractor under him to do certain masonry work. *Brown* determined his contract with the railway company. *Morse* being indebted to

C. A. 1883 — *In re* BROWN. WARD v. MORSE.

Brown, Brown brought an action—*Brown* v. *Morse*—to recover the amount of the debt, and took out a summons under Order XIV. This summons was opposed by *Morse*, who applied for and obtained leave to set up a counter-claim for damages for breach of the sub-contract caused by the determination of the contract with the railway company. Before the hearing of the action *Brown* died, and his executors continued the action. An administration order was made to administer *Brown's* estate, and the action, under the new title of *Ward* v. *Morse*, was transferred from the Exchequer into the Chancery Division.

Judgment was given in the action, in favour of *Brown's* estate, of *Ward* v. *Morse* for £238 6*s.* 8*d.*, the amount of the debt claimed, less a small sum claimed in the defence by way of set-off for goods sold and delivered by the Defendant to *Brown*, and on the counter-claim for damages, the counter-claim being referred back to Chambers by *Jessel*, M.R., with certain directions as to the footing upon which the damages claimed by *Morse* were to be calculated. These damages were ultimately allowed at £591 12*s.* 2*d.*

The Taxing Master, in pursuance of the above-mentioned order of the 19th of April, 1882, taxed the costs and allowed the whole of the costs of the action of *Ward* v. *Morse* to the Plaintiffs, and to the Defendant only his costs of the counter-claim and of a claim in Chambers in the administration of *Brown's* estate, and by his certificate taxed the costs of the applicants (the executors) and *J. Brown* of the action at £92 17*s.* 6*d.*, and the costs of the Defendant at £89 18*s.* 3*d.*

Morse took in objections in the taxation to allowances in the bill of costs of the Plaintiffs in the action and of *J. Brown*, and to disallowances in his own bill of costs, as follows:—

1. As to the bill of costs of the Plaintiffs:
   a. Objection to the allowance in that bill of the whole of the several items common to the action and counter-claim, and insists that the same ought to be apportioned, on the ground that neither the action nor the counter-claim was dismissed, and that the Plaintiffs should be allowed only such part thereof as is fairly attributable to the action.

b. To the allowance in that bill of all costs or increase of costs occasioned by the counter-claim, *e.g.*, the application for judgment under Order XIV., rule 1, and similar charges, and says that the Plaintiff should be disallowed all such costs as he failed on the counter-claim.

2. As to his own bill:

c. Objection to disallowance of the whole of the items common to both action and counter-claim, and says that such items should be apportioned, and that he should be allowed such part thereof as is fairly attributable to the counter-claim.

d. Objection to the disallowance of items relating in effect wholly to his counter-claim, *e.g.*, those on obtaining leave to defend on the application under Order XIV., rule 1, and similar charges.

The Taxing Master disallowed the objections, holding the case to be undistinguishable in principle from *Saner* v. *Bilton* (1) and *Mason* v. *Brentini* (2).

The Defendant applied by summons in Chambers that it might be referred back to the Taxing Master to review the taxation in respect of his objections. This summons was dismissed by Mr. Justice *Chitty* on the 14th of November, 1882.

The Defendant, on the 20th of February, 1883, moved to discharge the order dismissing the summons.

J. G. Wood, for the motion.

Beddall, for the Plaintiffs.

CHITTY, J.:—

In this case Mr. Justice *North* has ordered that it be referred to the Taxing Master to tax first the costs of (what I will call for shortness) the Plaintiffs, and of the above-named *John Brown*, of the action of *Ward* v. *Morse*, including the costs of the transfer thereof to this Division; and secondly, to tax the costs of *Stephen*

(1) 11 Ch. D. 416. (2) 15 Ch. D. 287.

C. A. 1883 *In re* BROWN. WARD *v.* MORSE. Chitty, J.

Morse of his counter-claim in the said action, and of his claim against the estate of the above-named testator, including therein the costs reserved by a particular order. And the order went on to direct a set-off as between the costs to be paid on one side and the other.

The point raised is this, the Taxing Master has given to the Plaintiffs the whole costs of the action without apportionment, and the substance of the argument on the part of the Defendant is that it is a miscarriage on his part, and that the costs ought to be apportioned, that is to say, the common charges in the action, such as term fees, attendances in Court, and the like, ought to be apportioned as between the costs of the action on the one side and the costs of the counter-claim on the other.

I will state very shortly what the nature of the litigation was. The action was commenced by a Mr. *Brown* against the Defendant for a debt, and the Defendant put in a defence setting up a set-off to a certain extent which did not exhaust the whole demand of the Plaintiff, and a counter-claim for damages. In the action the Plaintiff succeeded in recovering the whole amount of the debt, but the Defendant succeeded in his set-off to the extent the set-off was pleaded, and the Defendant recovered damages on his counter-claim, and the balance on the two accounts is in the Defendant's favour. In these circumstances the order I have read was made, and all I have now to do is to say whether the Taxing Master has correctly interpreted the order and given effect to the directions contained in it. Whether the order is right or not, is not a matter for my consideration.

Now the point came before Mr. Justice *Fry* in *Saner* v. *Bilton* (1), and in that case the plaintiff who had commenced an action against the defendant failed, and the defendant who set up a counter-claim failed, and both the action and counter-claim were dismissed with costs. Mr. Justice *Fry* obtained the opinion of Mr. *Bloxam*, in which other Taxing Masters of great experience concurred, and upon that opinion he acted, and he says (2), "the principal reason which leads me to that conclusion is this, that the plaintiff in the original action is the person who first commences litigation. The plaintiff in the action first lets out the

(1) 11 Ch. D. 416. (2) 11 Ch. D. 419.

waters of litigation, and it is impossible to say how far the counter-claim ever would have been agitated if he had not begun that litigation. That appears to me to furnish a reason why, as a general rule, the action should be treated as if it stood by itself, and the counter-claim should only bear the amount by which the costs of the proceedings are increased by it." In *Mason* v. *Brentini* (1) the same point came before the Court of Appeal, and the Master of the Rolls said, "I entirely agree with the decision of Mr. Justice *Fry* in *Saner* v. *Bilton* (2), and for the reasons which he has given; and am of opinion that his judgment is to be considered as expressing the rule of the Court."

The Taxing Master, having the decisions before him, has stated in his answer to the objections brought in that he considers the case is disposed of by the two authorities which I have mentioned. He says, "finding nothing in the objections to distinguish the case before me from these two authorities I disallow the objections." That is the question I have to consider stated in its narrowest form. Now if the principle is that where the plaintiff who commences the litigation is wrong there is to be no apportionment of costs, it seems to me that by analogy where the plaintiff is right, and the defendant is also right, as the Taxing Master says, the same rule must be applied. In my opinion, if the plaintiff who commences the litigation is right, the same rule ought to be applied to him, but inversely of course as to the plaintiff who commences his litigation being wrong. The effect of the new procedure under the *Judicature Act* appears to me to be this. The plaintiff who has commenced his action rightly and succeeded in it is met by a counter-claim. Before the *Judicature Act* there would have been a cross action for damages. The damages of course would not have been set off. The judgment would not have been for the balance, but there would have been a separate judgment. The effect then of the *Judicature Act* is this, that the costs of the whole litigation are reduced by not requiring two writs, and it appears to me the Defendant cannot complain of this practice. The Plaintiff recovers, as he would before the *Judicature Act*, the whole costs of the action, but the Defendant is put to less costs in regard to his

(1) 15 Ch. D. 287, 289. (2) 11 Ch. D. 416.

C. A. 1883 *In re* BROWN. WARD *v.* MORSE. Chitty, J.

counter-claim, and therefore he has a less demand in respect of the costs of the counter-claim, and in that way, as it appears to me, there is no injustice done to the Defendant.

He has to incur less costs in his counter-claim by reason of the amended procedure, and consequently, in order to indemnify him against these costs which have been rightly incurred by him, the Plaintiff has to pay them, but they are of a less amount than they would have been. In *Baines* v. *Bromley* (1), Lord Justice *Brett* expresses an opinion that "the proper principle of taxation if not otherwise ordered is to take the claim as if it and its issues were an action, and then to take the counter-claim and its issues as if it were an action, and then to give the allocatur for costs for the balance in favour of the litigant in whose favour the balance turns. In such a case where items are common to both actions, the Master would divide them. Where the so-called counter-claim is a set-off, there is but one action." The *dictum* appears not to have been acted upon in that particular case. There had been a miscarriage in the Taxing Master's office, but it was set right by the Court of Appeal. I have made inquiry, and the Taxing Masters are unable to tell me what occurred on the subsequent taxation of these costs, but Mr. *Beddall* has obtained some information, which I do not doubt is correct, that there was no apportionment in that case after the Court of Appeal's order had been made between the action on the one hand and the counter-claim on the other. That is but a *dictum*. I rather understand it to mean that when the Court is making the order for costs, regard should be had to the principle which the Lord Justice states to be the right principle according to his firm opinion. No doubt in this case it might have been contended before Mr. Justice *North* when he made the order for costs, that he ought to have directed an apportionment, but he has not done so, and I think I am precluded by the true effect of the authorities I have cited, and consequently this application fails. I therefore refuse the motion with costs.

C. A. From this order the Defendant appealed.

The appeal came on to be heard on the 13th of April, 1883.

(1) 6 Q. B. D. 197, 691, 695.

J. G. Wood, for the Appellant:—

The question is whether in a case where both claim and counter-claim succeed the common charges arising in the course of the litigation ought to be paid entirely to the successful plaintiff or be apportioned between him and the equally successful defendant. Where both succeed costs of action should be held to mean the separate costs of the action in addition to a proper amount of the common charges—costs of counter-claim, the separate costs of the counter-claim, besides a proper amount of the common charges—a contrary conclusion gives an advantage to the person who first rushes into litigation.

Mr. Justice *Chitty*, in confirming the Taxing Master's ruling, has relied on the authority of *Saner* v. *Bilton* (1) before Mr. Justice *Fry*, and *Mason* v. *Brentini* (2) before the Court of Appeal. But these cases are distinguishable from the present. In both the claim and counter-claim were dismissed with costs. But the decision in *Saner* v. *Bilton* applied to the particular circumstances of that case, and does not lay down any general rule applicable to all cases. The point on which Mr. Justice *Fry* seemed chiefly to rely was that the plaintiff, who there had to pay the general costs, had "let out the waters of litigation." That decision was followed under precisely similar circumstances by the Court of Appeal, and the reasons given for that decision were approved.

The case of *Baines* v. *Bromley* (3) was more like the present, where both claim and counter-claim were successful, and where the Taxing Master, seeing that the balance was in favour of the defendant, had given the general costs of the action to the defendant, which was more than the present Appellant asks, and the taxation was ordered to be reviewed, but the opinion of Lord Justice *Brett*, as there declared (4), is strongly in my favour. The distinction there drawn by him between a set-off and counter-claim applies here. The fact that no apportionment was ultimately made in that case does not bind the present Appellant. Mr. Justice *Chitty* has decided that there is to be no apportion-

(1) 11 Ch. D. 416.
(2) 15 Ch. D. 287.
(3) 6 Q. B. D. 197, 691.
(4) Ibid. 695.

C. A. 1883 *In re* BROWN. WARD *v.* MORSE.

ment unless so directed in the order to tax; in the opinion of Lord Justice *Brett* there should be unless otherwise ordered. The Appellant is at all events entitled to be allowed the costs of the summons taken out by the Plaintiff and on which the Defendant obtained leave to bring his counter-claim.

The counter-claim is now so far a separate action that it does not necessarily drop with the claim (1), and I submit that the charges, which would be duplicated if two distinct actions were brought, should be apportioned when the two separate actions are formally combined in one.

Ince, Q.C., and *Beddall*, were not called upon.

BAGGALLAY, L.J.:—

The question involved in this appeal appears to be this—in a case where there have been claim and counter-claim, and both have been successful, but the whole amount recovered on the counter-claim exceeds the whole amount recovered on the claim, how and in what way the costs common to both proceedings are to be disposed of. To some extent we have authority in the cases of *Saner* v. *Bilton* (2) and *Mason* v. *Brentini* (3). In each of those cases both parties failed, the claim and counter-claim being both dismissed with costs, the costs of the action to be paid by the plaintiff to the defendant, and the costs of the counter-claim to be paid by the defendant to the plaintiff, and the question raised on the taxation was whether all the proceedings which related to the claim and the counter-claim were to be apportioned, or whether the defendant was to pay only so much of the plaintiff's costs as were occasioned by the counter-claim, and the Court decided that the plaintiff was to pay the general costs of the action and the defendant only the costs of the proceedings so far as they had been increased by reason of the counter-claim. The case of *Saner* v. *Bilton* was decided by Mr. Justice *Fry* in 1879, and his decision was followed by the Court of Appeal in *Mason* v. *Brentini*.

(1) *McGowan* v. *Middleton* (*Weekly Notes*, 1883, p. 75) overruling *Vavasseur* v. *Krupp* (15 Ch. D. 474).

(2) 11 Ch. D. 416.

(3) 15 Ch. D. 287.

The case of *Baines* v. *Bromley* (1) before the other branch of the Appeal Court is in form more like the present, because in that both parties succeeded. There the plaintiff obtained on his claim a verdict for £114 17*s.*, and the defendants on their counter-claim a verdict for £230 0*s.* 9*d.*, and the Judge directed that judgment should be entered for the plaintiff on his claim and judgment for the defendants to recover on the counter-claim for £115 3*s.* 3*d.*, being the difference between the two sums, and by the judgment as entered it was adjudged that the plaintiff recover against the defendants £ for his costs of suit, and that the defendants recover against the plaintiff £115 3*s.* 3*d.* on the counter-claim, and £ for their costs of the counter-claim; and the question before the Court was how and in what way those costs should be disposed of. The Court decided that, on taxing the costs, according to the judgment, the plaintiff was entitled to the general costs of the action. In that case, the principle of taxation to be adopted was summed up by Lord Justice *Brett* in the following words (2): "I have, however, a firm opinion that where there is a claim with issues taken on it, and a counter-claim, not a set-off, but in the nature of a cross action with issues on it, and where the plaintiff succeeds on the claim and the defendant on the counter-claim, the proper principle of taxation, if not otherwise ordered, is to take the claim as if it and its issues were an action, and then to take the counter-claim and its issues as if it were an action, and then to give the allocatur for costs for the balance in favour of the litigant in whose favour the balance turns. In such a case where items are common to both actions, the Master would divide them." He then draws a distinction between the case where there is a counter-claim or separate action and where the so-called counter-claim is by way of set-off only, in which case there is only one action, and the decision arrived at was, as I have before mentioned, that the plaintiff was entitled to the general costs of action.

Apart from the authority of that case, it appears to me that the principle of *Saner* v. *Bilton* (3), although that was a case

(1) 6 Q. B. D. 691. (2) 6 Q. B. D. 695.
(3) 11 Ch. D. 416.

C. A. 1883 *In re* BROWN. WARD *v.* MORSE. Baggallay, L.J.

where both parties failed, should be equally applicable to a case where both parties have succeeded. The plaintiff should recover from the defendant the costs of action, except so far as they are attributable to the counter-claim, and the Defendant should recover from the plaintiff the costs of the counter-claim. If there are any costs which can be properly considered common to both suits, *e.g.*, a brief fee, if there is only one brief both on the claim or counter-claim—or the fees of assessors, or those on a reference, or other items which can be fairly considered to be common to both proceedings, they should be divided. But apart from this qualification, I think that *Saner* v. *Bilton* (1) equally applies whether claim or counter-claim both fail or both succeed.

COTTON, L.J.:—

I think that this case is governed by *Mason* v. *Brentini* (2), following *Saner* v. *Bilton*. True it is that in each of those cases both claim and counter-claim were dismissed with costs; but it was in each case held that there was to be no apportionment of the general costs of the action. We have in the present case a judgment to tax the Plaintiff's costs of the action and to tax the costs of the Defendant of his counter-claim as in *Saner* v. *Bilton*. The form of order is the same, and should receive the same construction. I can see no reason why a different construction should be put upon the same words in different orders, because in one case both parties are to pay costs, and in the other both are to receive costs. It is said why should not the Defendant call on the Plaintiff to pay to him all the costs which he would have had to pay had the Defendant brought a cross-action and succeeded? But the Defendant is in nowise injured, he gets a benefit from the combination of both actions in one. We should disregard the result of the proceedings when interpreting the words of the order before us, because we have to consider the words of the order without reference to any question whether the Plaintiff was right or wrong. It may be perhaps a ground for making some variation in the form of the order when the order is being made, but when once made it should be construed without reference to any such question.

(1) 11 Ch. D. 416. (2) 15 Ch. D. 287.

C. A.
1883
In re BROWN.
WARD v. MORSE.

FRY, L.J.:—

The Appellant's counsel has failed to convince me of any miscarriage either in the taxation or in the judgment of the Court below.

Solicitors: *Cowdell, Grundy, & Brown; C. J. Mander.*

M. W.

KENNEDY *v.* LYELL.

C. A.
1883
April 3, 7, 9, 10, 11, 14.

[1881 K. 651.]

Discovery—Interrogatories—Privileged Communications—Belief founded on Privileged Communications.

L. brought an action against *K.* to recover possession of real estates formerly belonging to *A. D.*, who had died intestate. His title was under a conveyance from persons who claimed to be the co-heiresses of *A. D.* *K.* brought an action against *L.* for penalties under 32 Hen. 8, c. 9, on the ground that he had bought a pretended title. *L.* exhibited interrogatories in the latter action for the examination of *K.*, by some of which various questions were asked as to the pedigree of the alleged co-heiresses. *K.* answered that he had no personal knowledge of any of the matters inquired after by these interrogatories, and that such information as he had received in respect of them had been derived by him from information procured by his solicitors or their agents in and for the purpose of defending his title to the estates, and he submitted that he ought not to be required to put in any further answer:—

Held, that since *K.*'s only information as to the matters of pedigree inquired after arose from privileged communications which he was not bound to disclose, and the matters inquired after were not simple matters of fact patent to the senses, he ought not to be compelled to answer on his belief as to those matters.

ANN DUNCAN died in November, 1867, intestate as to real estate, but leaving a will, by which she disposed of her personal estate. She was at her death seised in fee of freehold property at *Hardwick*, near *Manchester*. On the 24th of December, 1880, *Eleanora Bradock* and two other ladies, who were alleged to be the co-heiresses of *Ann Duncan*, executed a conveyance of their estate in the freehold property to the Defendant *Lyell*. *Lyell* on the 4th of January, 1881, commenced against *Kennedy* an action

C. A. 1883 KENNEDY v. LYELL.

to recover the property. The general nature of the case made in that action will be found in the report (1).

On the 21st of June, 1881, *Kennedy* commenced the present action against *Lyell*, and by his statement of claim alleged that the Defendant procured the execution of the indenture of the 24th of December, 1880, solely for the purpose of laying the foundation of an action of ejectment against the Plaintiff in respect of the property; that the said indenture constituted and was a bargaining, buying, selling, obtaining, getting, and having a grant of a pretended right or title within the meaning of statute 32 Hen. 8, c. 9; that for upwards of one whole year next before the date and execution of the said indenture the Plaintiff had been, and had ever since been, and then was in sole possession or in receipt of the rents and profits of the property, and every part thereof; and that *Eleanora Bradock* and the other two grantors had never been, nor had any one or more of them, or any ancestor or ancestors of theirs or any of them, or any persons or person by or through whom they or any of them claimed, ever been in possession of any part of the property or taken any of the rents or profits; and that the Defendant when he procured the execution of the said indenture was well aware of the above facts, and that the said indenture was an instrument within the prohibition of the statute. The Plaintiff claimed the benefit as against the Defendant of the forfeitures and penalties imposed by the statute on the Defendant in favour of the Plaintiff; an inquiry as to the value of the property; an order on the Defendant to pay to the Plaintiff half the value of the property and the costs of the action.

The Defendant, by his statement of defence, alleged in substance that from the time of the death of *Ann Duncan* the Plaintiff had been in possession of the property and in receipt of the rents and profits of it in a fiduciary character as trustee for the heirs of *Ann Duncan*, who at the time of her decease were not ascertained. He alleged that *Eleanora Bradock* and the two other parties were at the decease of *Ann Duncan* her co-heiresses at law, and that at the time of Miss *Duncan's* death *E. Bradock* was a married woman, and continued so till the death of her then

(1) 20 Ch. D. 484.

husband in October, 1876. The statement of defence contained an outline of the pedigree of the alleged co-heiresses.

The Defendant delivered a set of thirty-one interrogatories for the examination of the Plaintiff. The 3rd was as follows:—

"Is it not true, according to the best of your knowledge, information, and belief, that *Eleanora Bradock*, in the statements of claim and defence respectively mentioned, was at the time of the death of the said *Ann Duncan*, on or about the said 5th of November, 1867, a married woman, and that she continued so till the death of her then husband sometime and when in October, 1876, or when? Unless you answer in the affirmative, declare whether you or your agents or agent have any and what knowledge or information of the matters in this interrogatory inquired for, and whether you believe such information to be true, or how otherwise."

The 31st interrogatory was as follows:—

"Declare whether you have not caused searches and inquiries to be made as to the several matters in the following sub-sections respectively inquired for, or some and which of them, and whether and when you have received any and what information touching all or some and which of the matters hereinafter inquired for, and whether you believe such information to be true in any and what respect, and set forth a full, true, and particular account of the several matters following to the best of your knowledge, information, and belief (that is to say),

"(1.) Did not the said *Ann Duncan* of *Balchrystie* die there or elsewhere and where in the county of *Fife* on or about the 5th day of November, 1867, or when, without ever having been married, and were not all her lineal ancestors dead prior to the time of her death, or how otherwise.

"(2.) Was not the said *Ann Duncan* the lawful daughter of *David Duncan* of *Balhousie* in the statement of defence mentioned and *Helen Duncan* (*née Buchan*) his only wife, and was not the said *Ann Duncan* born at *Balhousie* aforesaid on or about the 5th of May, 1797, or when, and was she not at the time of her death the last lawful descendant of her said father."

(3.) An inquiry as to the parentage of *David Duncan*, the

C. A. 1883 KENNEDY v. LYELL.

father of *Ann Duncan*, and as to his marriage and the time of his death.

(4.) An inquiry whether *Ann Duncan* was not at her death the last or last known descendant of *George Duncan* and wife, her paternal grandfather and grandmother, and if not, an inquiry what other descendants there were.

"(5.) Is it not the fact that the said *George Duncan* of *Fingask*, in the last sub-section mentioned, was the lawful son of one *George Duncan*, formerly of *Walltree* of *Fingask*, in the said parish of *Rhynd* and county of *Perth*, and *Helen Duncan* (*née Imbrie*) his wife, and that he was born on or about the 8th of August, 1705, or when; and was not the said *Ann Duncan* of *Balchrystie* at the time of her death the last or last known lawful descendant of her great grandparents the said *George Duncan* of *Walltree* of *Fingask* and *Helen Duncan* (*neé Imbrie*) his wife, and of each of them. If you allege to the contrary, declare what other lawful descendants or descendant of her said great grandparents or of either or which of them were or was then living, and in what degree, and how such alleged descendants or descendant were or was related to the said *Ann Duncan* of *Balchrystie*, and give the name or names and address or addresses of such persons or person at the time aforesaid, and say whether the said person or persons, or any and what lawful descendants or descendant of such persons or person, are or is now living, and what the name or names of such person or persons is or are, and where he, she, or they is or are to be found, or was or were last to be found? Declare also how, when, and from whom you received your information as to the aforesaid persons or person, and whether you believe such information to be wholly or in any and what respect true, and when, where, how, or from whom you last heard of such persons or person."

(6.) An inquiry as to matters tending to shew that *Ann Duncan* was the last lawful descendant of her grandparents.

(7), (8), (9), and (10), were inquiries as to certain other matters of pedigree, tending to shew that the persons who made the conveyance of the 24th of December, 1880, were the co-heiresses of *Ann Duncan*.

Kennedy by his answer, in December, 1881, declined to answer a

number of the interrogatories, including interrogatory 3, on the ground that they were not revelant, and were not put *bonâ fide* for the purposes of the action. As regards interrogatories 30 and 31, after referring to various claims to the property which had been brought against him, he went on to say—"such of the searches and inquiries referred to in the 30th and 31st interrogatories as were actually made by me were made and prosecuted by my solicitors, or confidential agents instructed by them, and were made and prosecuted for the purposes of and with a view to the defence of my said title against the said claims, and for the purpose of obtaining legal advice in contemplation of litigation in respect of the said hereditaments. Under the circumstances I object to answer the 30th and 31st interrogatories."

The question as to the sufficiency of the answer came before the Court of Appeal, and on the 6th of February, 1882, the Court ordered *Kennedy* to put in a further answer to a great number of the interrogatories, including interrogatory 3, and a further answer to interrogatory 31 except subsection 11, and except as to the sources of information, *Jessel*, M.R., saying that the Plaintiff was bound to answer as to the nature of his possession, as to the pedigree so far as he knew it, and as to the representations which he had made to other people, everything in fact which would tend to shew that the Defendant's title was a good title and not a pretence title, and that his vendors were in constructive possession or in legal possession of the property within a year before the conveyance was made.

Kennedy put in a further answer, which, so far as related to interrogatory 3, and the first ten subsections of interrogatory 31, was as follows:—"The said *Ann Duncan* died at *Balchrystie* on or about the 5th day of November, 1867, without ever having been married, and I believe that she was the daughter of *David Duncan* of *Balhousie*. Except as aforesaid I have no personal knowledge of any of the matters inquired after by the 3rd interrogatory or the first ten subsections of the 31st interrogatory. Such information as I have received in respect of the said matters, other than as aforesaid, has been derived by me from information procured by my solicitors or their agents in and for the purpose of defending my title to the said hereditaments, and I submit that I ought not

C. A. 1883 KENNEDY v. LYELL.

to be required to make any further answer to the said 3rd and 31st interrogatories."

Vice-Chancellor *Bacon* held the answer sufficient and dismissed with costs a summons for a further answer. The Defendant appealed. The appeal came on before *Jessel*, M.R. and *Lindley*, L.J., who considered that a further answer ought to be given to some of the interrogatories, but expressed a strong opinion that the Plaintiff was protected on the ground of privilege from putting in any further answer to interrogatory 3, and the first ten subsections of interrogatory 31. The case, however, not having been concluded at the death of the Master of the Rolls, was reargued before *Baggallay* and *Cotton*, L.JJ., on the 3rd, 7th, 9th, 10th and 11th of April, 1883. The report is confined to the question as to these two interrogatories, the others not raising any point calling for a report.

MacClymont, for *Lyell*:—

The claim of privilege is not good. A party is bound to answer as to his knowledge, information, and belief: *Flight* v. *Robinson* (1); and it makes no difference that the party has no knowledge himself, but knows only on information of agents or from documents: *Earl Glengall* v. *Frazer* (2); *Attorney-General* v. *Rees* (3). Nor does it matter that the information or the documents were procured for the purposes of litigation: *Wright* v. *Vernon* (4); *Felkin* v. *Lord Herbert* (5); *Maden* v. *Veevers* (6); *Storey* v. *Lord Lennox* (7); *Llewellyn* v. *Badeley* (8). Nor is it a ground of protection that the agent employed to obtain the information was a solicitor: *Balguy* v. *Broadhurst* (9); *Wheeler* v. *Le Marchant* (10). A solicitor has no privilege as to extraneous facts, though he may claim protection for all communications, minutes of evidence, or documents which came into existence for the purposes of an action: *Doe* v. *Marquis of Hertford* (11);

(1) 8 Beav. 22.
(2) 2 Hare, 99, 105.
(3) 12 Beav. 50, 54.
(4) 1 Drew. 344.
(5) 30 L. J. (Ch.) 798.
(6) 7 Beav. 489.
(7) 1 My. & Cr. 525.
(8) 1 Hare, 527, 532.
(9) 1 Sim. (N.S.) 111.
(10) 17 Ch. D. 675.
(11) 19 L. J. (Q.B.) 526.

Parkhurst v. *Lowten* (1); *Spenceley* v. *Schulenburgh* (2); *Bramwell* v. *Lucas* (3); *Greenough* v. *Gaskell* (4); *Cholmondeley* v. *Clinton* (5); *Gore* v. *Bowser* (6); *Sawyer* v. *Birchmore* (7); *Lewis* v. *Pennington* (8). In such a case the question is, whether the information of the solicitor is obtained confidentially, *Marsh* v. *Keith* (9); *Ford* v. *Tennant* (10); *Desborough* v. *Rawlins* (11); *Mackenzie* v. *Yeo* (12); *Brown* v. *Foster* (13); *Ex parte Campbell* (14); *Weeks* v. *Argent* (15). The privilege of the client is less extensive than that of the solicitor: *Preston* v. *Carr* (16).

The privilege of documents does not extend to the belief obtained from their inspection, for a document may be privileged although an answer relating to the information contained in it might be enforced; *Southwark and Vauxhall Water Company* v. *Quick* (17); *Manser* v. *Dix* (18). Under the old practice such an allegation in a bill must have been answered on oath, and the principle still applies: *Earp* v. *Lloyd* (19); *Woodroffe* v. *Daniel* (20). We are entitled to know what the case made by our opponent is, however he knows it: *Eade* v. *Jacobs* (21), *Attorney-General* v. *Corporation of London* (22). [*Lonsdale* v. *Heaton* (23), *Mayor of Dartmouth* v. *Holdsworth* (24), *Goodall* v. *Little* (25), *Kerr* on Discovery (26), *Greenlaw* v. *King* (27), and *In re Land Credit Society of Ireland* (28), were also referred to.]

Horton Smith, Q.C., and *Clare*, *contrà*:—

Letters written in answer to inquiries made by a solicitor with a view to his client's defence in a litigation are privileged:

(1) 2 Sw. 194, 216.
(2) 7 East, 357.
(3) 2 B. & C. 745.
(4) 1 My. & K. 98.
(5) 19 Ves. 261, 272.
(6) 5 De G. & Sm. 30.
(7) 3 My. & K. 572.
(8) 29 L. J. (Ch.) 670.
(9) 1 Dr. & Sm. 342, 345.
(10) 32 Beav. 162.
(11) 3 My. & Cr. 515.
(12) 2 Curt. 866, 868.
(13) 1 H. & N. 736.
(14) Law Rep. 5 Ch. 703.
(15) 16 M. & W. 817.
(16) 1 Y. & J. 175.
(17) 3 Q. B. D. 315.
(18) 1 K. & J. 451.
(19) 4 K. & J. 58.
(20) 10 Sim. 243.
(21) 3 Ex. D. 335.
(22) 2 Mac. & G. 247.
(23) You. 72.
(24) 10 Sim. 476.
(25) 1 Sim. (N.S.) 155.
(26) Page 103.
(27) 1 Beav. 137.
(28) 15 W. R. 703.

C. A. 1883 KENNEDY v. LYELL.

M'Corquodale v. *Bell* (1). So reports from medical men consulted by a solicitor for the purpose of getting up the defence of a company are privileged: *Friend* v. *London, Chatham, and Dover Railway Company* (2); *Pacey* v. *London Tramways Company* (3).

[COTTON, L.J.:—Do you put this case on the same ground as an application for the production of documents?]

Yes; if the communications are privileged the knowledge arising from them must be so.

[COTTON, L.J.:—Does it necessarily follow that because you are not bound to shew the communication you need not answer as to the fact?]

There is no difference between a written communication and an oral one. A written communication under circumstances like the present is privileged: *Curling* v. *Perring* (4); an oral one must likewise be so; and if I need not disclose the information, I cannot be bound to disclose my belief which is grounded on that information only. In many of the cases referred to by the Appellant professional privilege was not claimed. *Desborough* v. *Rawlins* (5) is not against us; it was a case of communication with an adverse party. *Sawyer* v. *Birchmore* (6) was a case of communication with other parties, and not with a view to getting up the defence. *Ford* v. *Tennant* (7) is in the same position, and the *dictum* contained in it is inconsistent with the other authorities. *Gore* v. *Bowser* (8) relates to a communication between a solicitor and the adverse party. In *Brown* v. *Foster* (9) the solicitor had only gained the information as one of the public. *Lonsdale* v. *Heaton* (10) negatives the *dictum* in *Ford* v. *Tennant* that only communications between the solicitor and client are protected. In *Ex parte Campbell* (11) the solicitor had not learned the fact inquired after in any such way as to make the information privileged. In *Balguy* v. *Broadhurst* (12) privilege was not properly pleaded, for it is not enough to say that documents got into the

(1) 1 C. P. D. 471.
(2) 2 Ex. D. 437.
(3) Ibid. 440.
(4) 2 My. & K. 380.
(5) 3 My. & Cr. 515.
(6) 3 My. & K. 572.
(7) 32 Beav. 162.
(8) 5 De G. & Sm. 30.
(9) 1 H. & N. 736.
(10) You. 72.
(11) Law Rep. 5 Ch. 703.
(12) 1 Sim. (N.S.) 111.

possession of the solicitor for the purposes of the defence. *Goodall* v. *Little* (1) only decided that letters not coming through the solicitor were not privileged. *Wheeler* v. *Le Marchant* (2) has no direct bearing on the present case, but there are observations in it which are in our favour. In *Mayor of Dartmouth* v. *Holdsworth* (3) the only question was whether privilege was properly pleaded. *Spenceley* v. *Schulenburgh* (4) was a case of a document coming from the other side. In *Wright* v. *Vernon* (5) the information was obtained by the client not through his solicitor, and it does not appear that there was any claim of privilege. In *Greenlaw* v. *King* (6) the solicitor was not acting as the retained and paid solicitor of the party. As regards *Lewis* v. *Pennington* (7), there are some observations which are unfavourable to us, but the judgment is in our favour. In *Doe* v. *Marquis of Hertford* (8) no solicitor was concerned with the documents. In *Felkin* v. *Lord Herbert* (9) the question only related to the production of a deed.

[COTTON, L.J. :—How do you distinguish that case from the present?]

The deed is evidence in itself, the information is not. *In re Land Credit Society of Ireland* (10) is similar to *Baker* v. *London and South Western Railway Company* (11); it related to communications with the opposite party. In *Maden* v. *Veevers* (12) the documents were not connected with the professional advisers. In *Storey* v. *Lord Lennox* (13) privilege was not properly claimed. *Llewellyn* v. *Badeley* (14) is really in our favour. With the exception of the *dictum* in *Ford* v. *Tennant* (15) there is nothing in all the authorities cited against us which damages our case. Communications with the solicitors' agents as well as with the solicitors are privileged: *Lafone* v. *Falkland Islands Company* (16);

(1) 1 Sim. (N.S.) 155.
(2) 17 Ch. D. 675.
(3) 10 Sim. 476.
(4) 7 East, 357.
(5) 1 Drew 344.
(6) 1 Beav. 137.
(7) 29 L. J. (Ch.) 670.
(8) 19 L. J. (Q.B.) 526.
(9) 30 L. J. (Ch.) 798.
(10) 15 W. R. 703.
(11) Law Rep. 3 Q. B. 91.
(12) 7 Beav. 489.
(13) 1 My. & Cr. 525.
(14) 1 Hare, 527.
(15) 32 Beav. 162.
(16) 4 K. & J. 34.

C. A. 1883 KENNEDY v. LYELL.

Walsham v. *Stainton* (1); *Bustros* v. *White* (2); *Cossey* v. *London, Brighton, and South Coast Railway Company* (3). *Friend* v. *London, Chatham, and Dover Railway Company* (4), and *Southwark and Vauxhall Water Company* v. *Quick* (5) extend the privilege to documents prepared for the purpose of being laid before the solicitor. How is *Kennedy* to answer further. Personal knowledge he has none, all he could say is that his solicitor has told him something about it, and what his opinion is as to the accuracy of what he has been so told. But he is not bound to say what his solicitor has told him. This is in fact an attempt to learn what the solicitor has told the client. It would be unfair to obtain such information from a party: his solicitor may have discovered some points that make against his client and not have discovered other facts which would completely displace them. There is no way in which the Plaintiff could put in a further answer than by saying, My solicitor told me so and so, and in consequence of that information I believe so and so, but he clearly is not bound to say what his solicitor told him when the solicitor's knowledge was obtained as it was here.

MacClymont, in reply:—

I do not contend that I am entitled to ask what the solicitor has told his client, or to ask to see his evidence, but I contend that I am entitled to ask for the client's belief as to facts. We are now in the year 1883, and up to the present time there has never been such a claim of privilege as that now brought forward. The foundation of the doctrine of discovery in Equity is, that the Court will not allow a man to get a decision in his favour by suppressing facts which he knows. The rule has always been laid down generally that a party is bound to answer as to his belief, and there is nothing in any decision or in any text-writer supporting the proposition that a man can excuse himself from answering as to his belief of a fact by saying that he knows nothing about it except what he has learned through privileged communications.

(1) 2 H. & M. 1.
(2) 1 Q. B. D. 423.
(3) Law Rep. 5 C. P. 146.
(4) 2 Ex. D. 437.
(5) 3 Q. B. D. 315.

April 14. BAGGALLAY, L.J.:—

The question we have now to decide is whether the Plaintiff has sufficiently answered the 3rd and 31st of the interrogatories delivered by the Defendant for his examination. The questions as to the sufficiency of the answers to the other interrogatories have been disposed of. That with which we have to deal has reference to the extent of the privilege allowed to communications between a client and his solicitor. [His Lordship then shortly stated the nature of the two actions, and read the introductory part of the 31st interrogatory and the 1st, 2nd, and 5th of the sub-sections, and observed that the 1st sub-section inquired not only as to the date of the death of *Ann Duncan*, but as to whether she was not the last of her race, and that the 2nd and 5th sub-sections travelled far beyond simple questions of fact, and involved a considerable amount of legal inference as regarded the degrees of relationship of the several parties referred to. His Lordship then proceeded as follows:]—The sub-sections to which I have referred fairly illustrate the character of the first ten sub-sections of the 31st interrogatory, covering more than two pages of closely printed matter. I took occasion to observe in the course of the argument that, if an application had been made to strike out a great part of these interrogatories on the ground that they are oppressive, such application would, I think, have been successful. No such application, however, has been made, and the Plaintiff must answer, except so far as he can protect himself on the ground of privilege. I pass, then, from the 31st interrogatory with the remark that it is not confined to such questions, as whether a person died on a particular day, but extends to a variety of circumstances connected with the death.

The 3rd interrogatory is of a different character. The Plaintiff, amongst other things, claims the benefit of the *Statute of Limitations*, having been in possession for a period of twelve years, and the Defendant meets that by an allegation that one of the co-heiresses of *Ann Duncan*, for whom he alleges the Plaintiff to be trustee, was under coverture from the death of *Ann Duncan* to the year 1876. It is with reference to the allegation that one of these co-heiresses was under coverture that the 3rd interrogatory is filed. [His Lordship read the 3rd interrogatory.]

C. A. 1883 KENNEDY v. LYELL. Baggallay, L.J.

The first answer of the Plaintiff to these interrogatories was to the following effect. As regards the 3rd he alleged that the same was not relevant, and not put *bonâ fide* for the purpose of the action. As regards the 31st he says: "Such of the searches and inquiries referred to in the 30th and 31st interrogatories as were actually made by me were made and prosecuted by my solicitors or confidential agents instructed by them, and were made and prosecuted for the purposes of, and with a view to, the defence of my said title against the said claims, and for the purpose of obtaining legal advice in contemplation of litigation in respect of the said hereditaments." That answer, as far as regards the 3rd interrogatory, was held by the Court to be insufficient, and it was manifestly so. It may be most material to the Defendant to establish at the hearing that one of these ladies whose title is alleged to have been barred by the *Statute of Limitations*, was during a portion of the statutory period under coverture. As far as regards the 31st interrogatory, the original answer was held to be sufficient so far as regarded the searches and inquiries which had been asked after in the introductory part of the interrogatory, but that did not meet the various other questions of fact, or partly of fact and law, which formed the subject of the various sub-sections, and therefore a further answer was required to be put in to the first ten sub-sections. [His Lordship then read the further answer.]

It is contended on the part of the Defendant that this is not a sufficient answer. In form it appears sufficient, but it is alleged that the privilege there claimed is not a privilege which can extend to all the matters asked after by these two interrogatories.

A variety of topics have been introduced into the discussion which do not appear to me to have any bearing on the question we have now to decide. It has been said that it would be a great saving of expense if answers were given as to these matters of pedigree. I do not think that is a sufficient reason why the interrogatories should be answered. I do not see that the Defendant has a right to require an answer to be given to an interrogatory, which answer the Plaintiff could properly decline to give, merely because it would be a saving of expense that he should do so. As far as regards saving of expense I may,

however, observe that if the Plaintiff is called on to admit those several items in the course of the pedigree and he refuses to admit them, and afterwards expense is incurred in proving them, and the Court shall be of opinion that those admissions ought to have been given, then the expense may be fixed on the party who has refused to make the admission. Then again it has been said that this is the case of a common informer suing for a penalty, and of a person relying on a title by virtue of the *Statute of Limitations* against the true owners. That may well be, but if he is entitled to sue as a common informer or entitled to take advantage of the *Statute of Limitations*, that is no reason why he should be called on to give answers to interrogatories which he is otherwise entitled to refuse to answer. It has also been urged that there is no reason why he should refuse to answer because he has in other proceedings made reference to these matters of pedigree, and has in fact in some cases gone so far as to state them as positive facts. That again is no reason why he should be compelled to answer. He may have admitted them in certain other proceedings, but what we have now to deal with is a simple question, whether the answer is in itself sufficient? It may be that he has incorrectly stated that he has no personal knowledge, and it may be that the Defendant will be able to shew at the hearing of the cause that the Plaintiff had personal knowledge at the time when he said that he had not, but whether it is so proved at the hearing or not, we must, for the purpose of considering whether this answer is sufficient, assume that he has made an honest and true answer to the questions which are put to him.

Having made these preliminary observations I will proceed to the question which we have to decide. A number of cases have been cited, more even I think than were referred to in the great case of *Desborough* v. *Rawlins* (1). Many of those cases have really no bearing on the question we have now to consider, except so far as every case as to the right to refuse discovery on the ground of privilege affords an illustration of the general principles on which the Court acts. I think that the observations made by Lord *Cottenham* in that case are very applicable

(1) 3 My. & Cr. 515, 519.

C. A. 1883 KENNEDY v. LYELL. Baggallay, L.J.

to the present. He said, after referring to the number of cases that had been cited, and saying that he had taken the opportunity of looking at them, "I do not think that it is necessary that I should now lay down any rule as to the length to which the privilege should extend. It would not be very easy to do so consistently with the cases; but I am to consider whether the defendant clearly brings himself within the privilege." Many of the cases that have been cited appear not to be consistent with each other, but the apparent inconsistency does not, I think, arise from any doubt as to what the proper rule as to the extent of discovery is, but rather from the particular circumstances of the cases giving rise to a decision apparently in one direction in the one case, and in another direction in the other.

Many of the cases cited to us had no relation to communications between a solicitor and his client, but to the production of documents, all of which to a certain extent illustrate the general principle. Others have been cases where solicitors have been called as witnesses, and have demurred to answering certain questions, and where the Court has sometimes held that the questions must be answered and sometimes not. In the present case the question is to what extent a client is bound to state the effect of information given to him by his solicitor, such information having been procured by the solicitor in the course of collecting evidence for the purpose of the client's defence in an action.

I think that the principle applicable to this particular kind of discovery was stated very clearly by the late Master of the Rolls in *Wheeler* v. *Le Marchant* (1). He says (2): "The evidence obtained by the solicitor, or by his direction or at his instance, even if obtained by the client, is protected, if obtained after litigation has been commenced or threatened, or with a view to the defence or prosecution of such litigation." That, I think, is a very clear and very distinct statement of the rule. It is a rule by which, as it has been laid down in this Court, I feel myself bound, and not only so, but I assent fully and entirely to what is there stated. Of course the question will always arise whether the particular information in respect of which the privilege is claimed comes within the description of evidence obtained by the

(1) 17 Ch. D. 675. (2) 17 Ch. D. 682.

solicitor with a view to the defence or prosecution of the particular suit in which he is engaged; but in the present case I think that the Plaintiff has shewn a sufficient reason for refusing to answer.

The case of *Sawyer* v. *Birchmore* (1), which was strongly relied on by Mr. *MacClymont*, certainly raised some doubt in my mind till I looked more closely into it. Lord *Cottenham* there drew a distinction between questions seeking information as to matters of fact, and questions seeking information as to matters of confidential communication. The observation there made by Lord *Cottenham* was to some extent repeated by the Lord Chancellor when the action of *Lyell* v. *Kennedy* was recently before the House of Lords; Lord *Watson* had put the proposition in this way: "As the Plaintiff claims as heir-at-law, and the Defendant he alleges has admitted that he is liable to account to him, suppose the Defendant has admitted that, and then goes into the box. He is asked, 'Have you not made very wide investigations about this matter? Have you not examined all the Scotch records, and all the tombstones connected with the family of this man?' He will not disclose that. Then you follow that up by asking if *A. B.*, the deceased, was not the last of her line, and whether the Plaintiff is now the representative of her branch." Mr. *Clare* met that by saying they might call *Kennedy* if they liked and ask him that question, and then went on to say, "The question is not so much a question of competence, whether you can ask a man what steps he has taken, but whether he is at liberty to protect his own title." Then the Lord Chancellor made this observation, "Apparently that is his object, at least I assume so, and you cannot require him to put into the hands of his adversary anything which is in the nature of a privileged communication, but the question is whether you may or may not ask him as to the state of his knowledge and belief which may be obtained upon interrogatories. It does not seem to me that the cases which relate to the confidential communications themselves necessarily govern that question."

Now, taking that in connection with the observation of Lord *Cottenham*, there is a suggestion of a possible difference between

(1) 3 My. & K. 572.

C. A. 1883 KENNEDY v. LYELL. Baggallay, L.J.

a person being called on to answer as to matters of fact and being called on to answer as to matters of confidential communication. I think there are cases in which that distinction ought to be drawn, but it does not appear to me that it ought to be drawn in the present case. If the question had been as to a mere matter of fact, as for instance, "Is it not the fact that in the churchyard at *Perth* will be found a tombstone to the memory of *George Duncan*, stating that *George Duncan* died on a certain day," I should be very much inclined to hold that, if he were aware of the fact, the Plaintiff would be bound to answer, even although he only learnt the fact from his solicitor, who had discovered it while seeking evidence for his defence. I give that as an illustration of the class of cases in which I think the client might be called on to answer as to a simple question of fact, though he obtained his information through his solicitor. But I cannot regard any of the interrogatories with which we have now to deal as interrogatories coming under the definition of interrogatories upon mere matters of fact. If you ask, "Is there not a tombstone to the memory of the said *George Duncan?*" you introduce something very different from the question whether there is not a tombstone to the memory of *George Duncan*, because your question involves the question whether the person named on that stone is the same *George Duncan* as the person of that name as to whom the interrogating party is desirous of information. In asking is not he the same *George Duncan* as the *George Duncan* who was the grandfather of *Ann Duncan*, you are introducing matters far beyond simple matters of fact into the consideration. I have looked very carefully through all these ten sub-sections of the 31st interrogatory, and I cannot find in any one of them any question that appears to me to be a question as to a simple matter of fact, such as I have mentioned. I may indeed possibly have overlooked some, for there are altogether some 200 or 300 separate questions. So far as I can discover, each question involves either a single matter of fact taken in connection with other matters of fact derived from other sources, or a matter of fact in connection with an inference of law. Having given my best consideration to the various sub-sections, I am of opinion that the Plaintiff's claim to be at liberty to

decline answering them on the ground of privilege is well founded. Whether in refusing to answer, he does not put a weapon into the hands of his adversary, may be a very serious question for him to consider, but with that we have nothing to do.

As regards the 3rd interrogatory the same observation applies. That has reference to the question whether a particular lady was not a married woman from 1867 down to 1876. The Plaintiff says I have no personal knowledge, I got any information I had from my solicitor, who made the inquiries, or from the persons whom he employed for the purpose of making those inquiries. They are all essential to my defence, because it is on the proof of the alleged pedigree that the Defendant rests his case. In my opinion the claim of privilege set up by the answer is one which the Plaintiff is entitled to sustain both in respect of the ten sub-sections of the 31st interrogatory, and in respect of the 3rd interrogatory.

COTTON, L.J.:—

The only question we have now to consider is whether the answer to interrogatory 3 and certain portions of interrogatory 31 is sufficient. That depends on the question whether the Plaintiff's claim to be exempted from giving discovery on the ground of professional privilege is valid. In substance what the Plaintiff alleges is that all he knows is by information given to him by his solicitor, and that the information which the solicitor gave him was the result of inquiries made by the solicitor in order to obtain materials for the purpose of the Plaintiff's defence to actions brought against him with reference to this estate. The inquiries therefore were made in contemplation of litigation, and for the purpose of obtaining evidence or materials for defending the Plaintiff's title, and resisting the claims that might be made against him.

Now it is clear, and was not disputed by Mr. *MacClymont*, that if written reports of the result of the solicitor's inquiries had been handed by him to the Plaintiff, they would have been protected from production, and that the same rule would apply to verbal communications of the result of the inquiries. In the one case

C. A. 1883 KENNEDY v. LYELL. Cotton, L.J.

they would be confidential written reports, and in the other confidential verbal reports. I agree, however, that there is a difference between requiring a person to disclose reports as a whole, whether written or verbal, and requiring him to answer as to facts which he knows only from those reports. It is obvious that there is a distinction between the two cases, for the report as a whole would be certain to contain confidential advice and inferences drawn by the solicitor.

Each side has contended that this point has been decided in their favour. The Respondent relies on what was said by the Master of the Rolls and Lord Justice *Lindley* when the case was before them, but from what I learn from Lord Justice *Lindley* I think they cannot be considered to have decided the question, though observations were made which agree with the result at which I have arrived in this case. Mr. *MacClymont* contends that the House of Lords in *Lyell* v. *Kennedy* decided the point, but their judgment does not decide it. There was indeed a dictum by the Lord Chancellor which is favourable to the Appellant, but it was made only during the course of the argument, and probably for the purpose merely of directing counsel's attention to the distinction to which I have referred.

What is the ground on which all professional privilege is claimed? It is this—that having regard to the technical nature of our law it is of the utmost importance that no layman should be in any way hindered from having the utmost freedom in communicating with his professional advisers, whether counsel or solicitors. There is also another principle, that no one is to be fettered in obtaining materials for his defence, and if he for the purpose of his defence obtains evidence, the adverse party cannot ask to see it before the trial. I do not think that this principle applies here, but I mention it that I may not be supposed to limit protection to the simple professional privilege which arises where information has been obtained through a solicitor.

On the point which we have now to decide there is, I think, no direct authority. We must then examine the authorities, and if they do not lead to any conclusion one way or the other, we must consider what is the proper decision upon principle.

A great number of cases have been cited, some of which need

not be mentioned, as they were not pressed upon us when it was pointed out what their subject matter really was; but there are some which must be considered. There are cases in which solicitors have been obliged to answer as to matters which they learnt while acting for their clients, and in some of them there are expressions by the Judges which, if taken as absolute and exhaustive statements of the law applicable to such cases, would go far to support the contention of the Appellant. I have endeavoured to classify these cases. The first class is referable to the principle that no communication made to a solicitor by or on behalf of the opposite party can be confidential. The first case of that kind was *Spenceley* v. *Schulenburgh* (1). There a solicitor was called upon to prove the contents of a notice to produce, served on him by the other side; and he was ordered to give evidence about it. Lord *Ellenborough* said: "That the privilege was restricted to communications, whether oral or written, from the client to his attorney, and could not extend to adverse proceedings communicated to him as attorney in the cause from the opposite party, in the disclosure of which there could be no breach of confidence. Here the attorney did not even acquire his knowledge of the contents of the paper from his client, even if that could have made a difference, which might be questioned, but he received the paper himself." Mr. *MacClymont* treats this as laying down that the only professional privilege is for communications between solicitor and client. But that is not so. If a solicitor in contemplation of litigation obtains a report from a person whom he employs to collect evidence, that report undoubtedly is privileged. The case only decides that a communication from the other side is not privileged. The same principle was acted on in *Desborough* v. *Rawlins* (2), where a solicitor was asked as to what passed at a meeting with his client's opponent. So in *Baker* v. *London and South Western Railway Company* (3), where there were negotiations for compromise between the company and the testator of the plaintiff; the reports of what took place at the interviews between the officers of the company and the testator were held not privileged, for the communications

(1) 7 East, 357, 358.
(2) 3 My. & Cr. 515.
(3) Law Rep. 3 Q. B. 91.

C. A. 1883 KENNEDY v. LYELL. Cotton, L.J.

could not be confidential. So in *Gore* v. *Bowser* (1) the Plaintiff's solicitor was held bound to give evidence of what passed at a meeting between him and the Defendant. *Ford* v. *Tennant* (2) is a case of the same kind. A solicitor was required to give evidence of what had passed between him as solicitor of his client and a person with whom his client had a dispute. That was not confidential information, nor information obtained for the purpose of defending the client's title.

There is a second class of cases which come nearer to the present case, and might govern it if the view urged by the Appellant were accepted, that these interrogatories inquire only as to matters of fact. *Brown* v. *Foster* (3) is an example. That was an action for malicious prosecution on the ground of a charge brought against the plaintiff before a magistrate. A book was produced, and it was suggested that an entry had been made in it after the proceeding before the magistrate. The gentleman who had acted as counsel for the plaintiff before the magistrate was called on to say, and the Judges held that he was bound to say, what was the state of the book when the examination before the magistrate took place. It was urged in the present case, if the Plaintiff here can protect himself on the ground of privilege, how could the counsel in that case be bound to disclose what he knew only as counsel? The judgments in that case supply the answer. Baron *Martin* says, "I agree that what passes between counsel and client ought not to be communicated, and is not admissible in evidence, but with respect to matters which the counsel sees with his eyes, he cannot refuse to answer." The other Judges say in substance the same thing. *Sawyer* v. *Birchmore* (4) is also referable to the principle that the solicitor was only asked to give evidence of a fact patent to his senses. Cases such as *Balguy* v. *Broadhurst* (5) seem to go on the ground that documents which the solicitor had obtained, although in his employment as solicitor, were, so to say, facts patent to the senses, and that as there was no ground of protection but that he had got them as solicitor for the purposes of the defence, they must be disclosed.

(1) 5 De G. & Sm. 30.
(2) 32 Beav. 162.
(3) 1 H. & N. 736, 740.
(4) 3 My. & K. 572.
(5) 1 Sim. (N.S.) 111.

Wheeler v. *Le Marchant* (1) does not come within either of the above classes. What was said by the Master of the Rolls is rather in favour of the Respondent, but all that was decided was that communications between the solicitors and the surveyor of the client before any litigation was contemplated were not protected. That case would have been material to the present if the communications had taken place after litigation was contemplated, and in order to obtain evidence in support of the client's title. But the case went on this, that the communications were not between the solicitor and client but between the solicitor and the third party before any dispute had arisen. In *Marsh* v. *Keith* (2) all that was laid down was, that the mere fact that the information was acquired by the solicitor from third parties during his employment as solicitor did not protect it.

In the case of *Lewis* v. *Pennington* (3) it was held that the mere circumstance that a solicitor or client obtains by means of confidential communications information about a fact, does not protect him from disclosing what he already knew about that fact, and possibly this may be what the Lord Chancellor referred to in the House of Lords, when he used the expressions which have been relied upon by the Appellant. I do not, however, think that this is material to the present case, for I have come to the conclusion, and I understand Lord Justice *Baggallay* to be of the same opinion, that these interrogatories are not questions as to any fact patent to the senses—anything which could be seen with the eyes or heard with the ears. Of course, the information received by the solicitor is, in a sense, a fact heard by the ears; but the question is whether the client is bound to communicate to the other side the result of the inquiries made by his solicitor. The information which a solicitor employed to obtain materials for his client's defence communicates to the client is privileged, if it is not merely the statement of a fact patent to the senses, but is the result of the solicitor's mind working upon and acting as professional adviser with reference to facts which he has seen or heard of. Here the questions are not of this kind—whether there is in such a churchyard a tomb with such an inscription—whether

(1) 17 Ch. D. 675. (2) 1 Dr. & Sm. 342.
(3) 29 L. J. (Ch.) 670.

C. A. 1883 KENNEDY v. LYELL. Cotton, L.J.

there is in such a parish book an entry of such a marriage or such a death. Those are inquiries which the solicitor or client might be bound to answer; it is not necessary to decide now whether they would, though some of the cases referred to certainly go that length. The questions here are of this kind: "Were not *A.* and *B.* co-heiresses of *M.*?" "Was not *C.* the last lawful descendant of *N.*?" and so forth—all questions not as to facts patent to the senses, but as to the probable results and inferences of and from facts patent to the senses. Having regard to the way in which the solicitor was employed on behalf of his client for the purpose of protecting his interests and obtaining evidence for his defence, I am of opinion that the client is not bound to disclose any information given him by his solicitor as to the inferences drawn by him, or as to the effect on his mind of what he has seen or heard, any more than he would be bound to produce as a whole the confidential reports made to him, whether in writing or verbally, by his solicitor, as to the result of the inquiries which the solicitor has made.

In my opinion, therefore, the claim of privilege is effectual to protect the Plaintiff from being required to give any further answers to these interrogatories.

Solicitors for Plaintiff: *Rooke & Sons.*
Solicitor for Defendant: *J. Balfour Allan.*

H. C. J.

Ex parte IZARD. *In re* CHAPPLE.

C. A.
1883
April 26.

Bill of Sale—Registration—"Order and Disposition" of Grantor—Bills of Sale Act, 1878 (41 & 42 *Vict. c.* 31), *s.* 20—*Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 3, 15—*Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 15, *sub-s.* 5.

Notwithstanding the repeal of sect. 20 of the *Bills of Sale Act*, 1878, by sect. 15 of the *Bills of Sale Act*, 1882, the effect of sect. 3 of the latter Act is, that the grantee of a bill of sale, registered under the Act of 1878 before the coming into operation of the Act of 1882, is, so long as the registration is subsisting, entitled to the protection afforded by sect. 20 against the "order and disposition" of the grantor, even when an act of bankruptcy is committed by the grantor after the coming into operation of the Act of 1882.

THIS was an appeal from a decision of Mr. Registrar *Murray*, acting as Chief Judge in Bankruptcy.

On the 18th of September, 1882, *Edward Chapple*, a grocer, executed a bill of sale of his furniture, stock-in-trade, and other chattels to *Samuel Betts*, a money lender, as security for an advance of £200 made to him by *Betts*, together with the further sum of £60 for interest, commission, and expenses attending the advance. The deed was registered under the *Bills of Sale Act*, 1878, on the 20th of September, 1882. On the 1st of November, 1882, the *Bills of Sale Act*, 1882, came into operation. On the 2nd of November *Chapple* filed a liquidation petition. At this time the goods comprised in the deed were actually in the possession of *Chapple*. On the 16th of December *Chapple's* creditors resolved upon a liquidation of his affairs by arrangement, and appointed a trustee of his property. The trustee applied to the Court for an order declaring that the goods comprised in the bill of sale were at the commencement of the liquidation in the order and disposition of the debtor with the consent of *Betts*, and directing *Betts* (who had since taken possession of them) to deliver them up to the trustee. The ground of the application was that sect. 20 (1) of the *Bills of Sale Act*, 1878, by virtue of which the

(1) Sect. 20 of the Act of 1878: "Chattels comprised in a bill of sale which has been, and continues to be, duly registered under this Act shall not be deemed to be in the possession, order, or disposition of the grantor of

C. A. 1883

Ex parte IZARD. *In re* CHAPPLE.

registration of the bill of sale excluded the order and disposition of the grantor, had been repealed by sect. 15 of the *Bills of Sale Act*, 1882, as from the 1st of November, 1882. The Registrar refused the application. The trustee appealed.

Cooper Willis, Q.C., and *F. Cooper Willis*, for the Appellant:—

The act of bankruptcy was committed after the Act of 1882 had come into operation. The effect of sect. 15 of that Act is to repeal sect. 20 of the Act of 1878 as regards a transaction which took place after the commencement of the Act of 1882. The exception introduced by sect. 3 does not apply to "order and disposition," because that does not affect the validity of the bill of sale itself, but only affects the title of the bill of sale holder. It is because the bill of sale is valid, and the bill of sale holder is under it the true owner of the goods, that the doctrine of "reputed ownership" applies, if it does apply. The effect of sect. 20 was to remove a certain presumption of fact in favour of the holder of a registered bill of sale; the moment that section is repealed that presumption naturally arises again. Sect. 15 repeals sect. 20 to all intents and purposes. On any other construction great inconvenience would arise. If a bill of sale had been originally registered under the Act of 1878, and then was continually re-registered, twenty years hence it would stand in a different position from any bill of sale which was originally registered under the Act of 1882. The intention of the Act of 1882 was to

---

the bill of sale within the meaning of the *Bankruptcy Act*, 1869."

Sect. 2 of the Act of 1882: "This Act shall come into operation on the 1st of November, 1882, which date is hereinafter referred to as the commencement of this Act."

Sect. 3 provides that "The *Bills of Sale Act*, 1878, is hereinafter referred to as (the principal Act) and this Act shall, so far as is consistent with the tenor thereof, be construed as one with the principal Act; but, unless the context otherwise requires, shall not apply to any bill of sale duly registered before the commencement of this Act, so long as the registration thereof is not avoided by non-renewal or otherwise."

Sect. 15: "The 8th and 20th sections of the principal Act, and also all other enactments contained in the principal Act which are inconsistent with this Act, are repealed, but this repeal shall not affect the validity of anything done or suffered under the principal Act before the commencement of this Act."

place all bills of sale on the same footing. It would be absurd to repeal sect. 20, and then to say that the repeal was not to apply to the only thing to which it could apply. The saving introduced by sect. 3 applies only to the period between the passing of the Act of 1882 and the date fixed for its commencement.

Winslow, Q.C., and *Lyon*, for the bill of sale holder, were not heard.

BAGGALLAY, L.J. (after stating the facts), continued:—

The argument for the Appellant is that, the Act of 1882 having come into operation on the 1st of November, the bill of sale holder has lost the protection to which down to that day he was entitled under sect. 20 of the Act of 1878, and that on that day the goods came into the order and disposition of the debtor. I read sect. 3 as if it had said, "Unless the context otherwise requires, sect. 15 of this Act shall not apply to any bill of sale registered before the commencement of this Act, so long as the registration is not avoided." Sect. 15 provides that from henceforth sect. 20 of the Act of 1878 (the section which afforded protection to the bill of sale holder against the order and disposition clause of the *Bankruptcy Act*) is repealed, and, were it not for sect. 3, it might very well be said that, as from the 1st of November, 1882, sect. 20 is repealed to all intents and purposes,—that as regards bills of sale already registered under the Act of 1878, as well as future bills of sale, it is absolutely done away with. But the exception introduced by sect. 3 is that sect. 15 is not to apply to any bill of sale duly registered before the commencement of the Act of 1882, "unless the context otherwise requires." The words are very clear and distinct. Sect. 20 of the Act of 1878 is to be repealed in such a way as that the repeal is not to apply to any bill of sale duly registered before the commencement of the Act of 1882, "unless the context otherwise requires." Is there anything in the context which "otherwise requires" in the present case? I can find nothing. I think the language of sect. 3 is sufficient to relieve the bill of sale holder from the penalty to which he would have been exposed by virtue of sect. 15, if sect. 3 had not limited the operation of that

C. A. 1883 *Ex parte* IZARD. *In re* CHAPPLE.

section. The appeal, therefore, fails, and must be dismissed with costs.

LINDLEY, L.J.:—

I am of the same opinion. The question turns upon the construction of sects. 3 and 15 of the Act of 1882. Sect. 15 simply repeals sect. 20 of the Act of 1878, which in substance said that the title of the holder of a registered bill of sale should not be liable to be defeated by the order and disposition clause of the *Bankruptcy Act*. The owner of goods by virtue of a registered bill of sale was to be treated as having signified his dissent from the goods being in the possession, order, or disposition of the grantor, or on some other theory he was to be protected from the operation of the order and disposition clause. Anything which destroys his title to the goods appears to me to affect the bill of sale. Sect. 15 is a little ambiguous; the repeal of sect. 20 effected by it might apply to a bill of sale registered before the commencement of the Act of 1882 as well as to one registered afterwards. But by sect. 3 this ambiguity is removed. When sect. 3 says "unless the context otherwise requires," I apprehend the context of the Act of 1882 is meant. Does then the repeal of sect. 20 by sect. 15 come within the words of sect. 3? Can you, consistently with sect. 3, hold that the title of the holder of a bill of sale registered before the commencement of the Act of 1882 is destroyed by the operation of the repeal effected by sect. 15? It appears to me that that would be to strain the language of sect. 3, and would not be right. We should be forcing the language of sect. 3 if we were to say that it does not relate to the question of order and disposition, because the order and disposition clause does not apply to the bill of sale as such, but only to the title of the bill of sale holder to the goods. This would be too narrow a construction.

FRY, L.J.:—

I entirely agree in the judgments which have been pronounced by my learned brethren. It appears to me plain that sect. 3 was intended to prevent the application of any portion of the Act of 1882 to a bill of sale previously registered under the Act of

C. A.
1883
Ex parte IZARD.
In re CHAPPLE.

1878, "unless the context otherwise requires," and I think there is no context which does "otherwise require" in the present case. It must be borne in mind that the Act of 1882 was not intended to be a code regulating all bills of sale. A large class of bills of sale is excepted from its operation. All absolute bills of sale are excepted, and, in my judgment, all bills of sale which were, previously to the 1st of November, 1882, duly registered under the Act of 1878, are also excepted, "unless the context otherwise requires." In the present case I think the context does not "otherwise require." I agree, therefore, that the appeal must be dismissed with costs.

Solicitors for trustee: *Wood & Wootton.*
Solicitor for bill of sale holder: *Alfred Ashley.*

W. L. C.

In re SCOTTISH PETROLEUM COMPANY.

C. A.
1882
KAY, J.
July 22.
C. A.
1883
April 16, 17, 28.

Winding-up—Repudiation of voidable Contact to take Shares—Change of Directors—Allotment—Quorum of Directors.

By the articles of association of a limited company it was provided that the number of directors should not be less than four or more than seven, and *G.*, *R.*, *S.* and *Y.* were named the first directors. It was provided that two directors should form a quorum, and that the continuing directors might act notwithstanding any vacancy in the Board. The directors were empowered to fill up casual vacancies. A prospectus was issued giving the names of the directors and mentioning *G.* as chairman. *W.*, who was acquainted with *G.*, after communicating with him, applied for shares on the faith of *G.* and *R.* being directors. At the first meeting of directors on the 12th of November, 1880, *S.* and *Y.* only were present, *G.* and *R.* having sent in their resignation on that day; *S.* and *Y.* elected a third director who was not present, and proceeded to allot shares. A letter of allotment in the common form was received by *W.* about the 15th of November, accompanied with a letter stating that *G.* and *R.* had resigned. *W.* on the 27th wrote to withdraw his offer to take shares on the ground of *G.* and *R.* not being directors. The company refused to withdraw his name. On 3rd of February, 1881, *Anderson*, another shareholder, obtained an order to remove his name from the register on the ground of the change in the board, but no agreement was shewn that the proceedings in his case should govern the cases of other repudiating allottees.

Held, that although there was not a board of four directors, a quorum of two was competent to allot shares.

Held, also, that the letter accompanying the letter of allotment, and

C. A.

1883

In re SCOTTISH PETROLEUM COMPANY.

stating the fact of the retirement of *G.* and *R.* did not qualify the letter of allotment, so as to prevent it from being an unconditional acceptance of *W.'s* offer to take shares.

Held, therefore, that the allotment was not void.

Held, by *Kay*, J., that *W.* never had any right to repudiate his shares, but held by the Court of Appeal, approving *Anderson's Case* (1), that as the application to take shares was made on the faith of *G.* and *R.* being directors, and they had ceased to be so before allotment, the allotment was voidable.

Whether a repudiation by *W.* so late as the 27th of November would in the case of a going concern have entitled him to be relieved from the shares *quære.*

But *held*, by *Kay*, J. and by the Court of Appeal, that assuming *W.* to have had a right to rescind, still as he had not before the winding-up taken any proceedings to have his name removed from the register, and no agreement was shewn that the cases of other repudiating allottees should be governed by the result of the proceedings in *Anderson's Case*, *W.* must be on the list of contributories.

Fox's Case (2) observed upon.

THE *Scottish Petroleum Company* was incorporated on the 19th of October, 1880, as a limited company, for the purpose of carrying on a manufacture at *Paris*, and in that month a prospectus was circulated which stated that the directors were *A. H. Gibson*, *J. M. Ross*, *D. Simpson* and *G. Yooll*, Mr. *Gibson* being the chairman. These four directors had in fact been appointed by the articles. The capital was stated to be £30,000 in 3000 shares of £10, of which 1000 shares were to be allotted to the vendor of the business in part payment of his purchase-money of £18,000 and the rest subscribed for, £1 per share to be paid on application and £2 more per share on allotment.

On the 30th of October, 1880, *A. P. Wallace*, who had business relations with Mr. *Gibson*, wrote to him: "I have had a prospectus or two of the *Scottish Petroleum Company* given me in which I observe your name, and from which I conclude you consider it a good investment." *Gibson* on the 1st of November, replied: "I shall be glad to have your application for shares in the *Scottish Petroleum Company*, it promises to be lucrative."

On the 10th of November, 1880, *Wallace* sent in an application for ten shares, and paid at the same time the £1 per share payable on application.

(1) 17 Ch. D 373. (2) Law Rep. 5 Eq. 118.

On or about the 15th of November, *Wallace*, who lived in *Scotland* received, from the secretary of the company a letter dated the 12th:

"Sir,—The directors have in accordance with your application allotted you ten shares in this company, due notice will be given when the certificates are ready, Yours &c."

Along with the letter of allotment was sent another letter from the secretary in the following terms:

"With reference to the accompanying letter of allotment I beg to remind you that the sum of £2 per share is payable on allotment, and I shall be glad if you will on receipt of this remit to the company's bankers a cheque for the amount due in respect of your application. I have to inform you that since the date of your application for shares Mr. *A. H. Gibson* and Mr. *J. M. Ross* have retired from the board of directors, the former owing to pressure of private business, and the latter owing to Mr. *Gibson's* resignation. M. *J. Courcier*, of *Belincourt*, near *Paris*, an applicant for shares, has been elected a director in the place of Mr. *Ross*, and other directors will be elected at the first general meeting of the company."

Wallace consulted Mr. *Gibson* about the reasons for his retirement, and not receiving any answer which he considered satisfactory, he, on the 27th of November, 1880, wrote to the secretary stating that on the ground of the retirement of Messrs *Gibson* and *Ross* he withdrew his application for shares and requested the return of the £10 paid on application. On the 3rd of December the solicitors of the company wrote to say that the directors could not release *Wallace* from his contract on the ground alleged, and that they requested him to pay the amount payable on the allotment of his shares. On the 7th *Wallace* replied, referring to his letter of the 27th of November, and expressing the hope that in the interests of the company and all concerned they would advise the return of the £10. No reply was received to this letter, but on the 8th the secretary wrote to *Wallace* asking for payment of the £20 payable on allotment. *Wallace* on receipt of this letter, wrote on the 10th of December, 1880, a letter in reply referring to his letter of the 27th of

C. A. 1883 — *In re* SCOTTISH PETROLEUM COMPANY.

November, and asking for the return of his £10. Here the correspondence ended.

On the 3rd of February, 1881, Vice-Chancellor Malins made an order for removing the name of a shareholder named *Anderson* from the register, on the ground that he had taken shares on the faith of *Gibson* and *Ross* being directors (1). On the 8th of February, 1881, the company gave *Wallace* notice of a general meeting to be held on the 17th of February, 1881, and on the 7th of May, 1881, gave him notice of another general meeting. On the 27th of May, 1881 an order was made for winding-up the company. There had not been any communication between *Wallace* and the company since the letter of the 10th of December, 1880, except the service of the above notices of meetings; and *Wallace* had taken no step in the matter. His name was placed on the register of shareholders soon after the allotment.

In order to shew the ground on which one of the questions argued was raised, it is necessary to state some further facts. The first meeting of directors was held on the 12th of November, 1880, *Yooll* and *Simpson* were present. A letter of the 9th of November was read from *Gibson's* solicitors stating that in consequence of other duties and arrangements he could not allow himself to be appointed a director, and a letter of the 12th of November from *Ross* was read to the effect that in consequence of *Gibson's* resignation he could not allow himself to be appointed a director. M. *Courcier* of *Paris* was elected a director in the place of *Gibson*. The two directors present proceeded to allot shares, and the allotment to *Wallace* was then made. The question whether these two directors out of a total of three were competent to act, turned on the following provisions in the articles:

"66. The number of directors shall not be less than four or more than seven, unless a general meeting shall otherwise prescribe."

"67 The first directors of the company shall be *A. H. Gibson*, *J. M. Ross*, *D. Simpson*, and *A. G. Yooll*."

"82 Any casual vacancy occurring in the board of directors by death, resignation, or otherwise, may be filled up by the

(1) 17 Ch. D. 373.

directors, but a person so chosen shall only retain his office so long as the vacating director would have retained the same if no vacancy had occurred."

"83. The continuing directors may act notwithstanding any vacancy in the board."

"84. The directors may meet together for the dispatch of business, adjourn and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. . . . Three directors may at any time summon a meeting of directors, and until otherwise determined two directors shall be a quorum at any meeting."

"88. All acts done by the board or committee of the directors shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any of the directors or persons acting as aforesaid, or that they or any of them were or was disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director."

Wallace and some other persons who had taken shares at the same time with him applied by summons to have their names taken off the list of contributories on the ground that they had taken their shares on the faith of *Gibson* and *Ross* being directors, which they were not at the time of the allotment.

The summons was heard before Mr. Justice *Kay* on the 22nd of July, 1882.

Haldane, for the summons:—

Mr. *Wallace* wrote to the secretary of the company on the 27th of November, 1880, repudiating his shares, because the two directors in whom he had confidence, and whose names were on the prospectus, had retired before his application for shares was accepted. This case is very like *Anderson's Case* (1) where it was held by Vice-Chancellor *Malins* that under the circumstances, similar to those here, the applicant was entitled to have his name removed from the register of shareholders. It is true that *Anderson* wrote on the day he received the letter of allotment, and the information that Messrs. *Gibson & Ross* had retired from the directorate; but what does it matter whether Mr. *Wallace* wrote

(1) 17 Ch. D. 373.

C. A. 1883 *In re* Scottish Petroleum Company.

in two days, two months, or two years; he being entitled to repudiate the contract because the directors were not the same. It may be contended that this case is like that of *Hallows* v. *Fernie* (1), and that of *Blake's Case* (2), but the circumstances are very different. I submit that Mr. *Wallace* had a right to repudiate on the 27th of November, *Anderson's Case* (3), and that he did so effectually when he requested the return of his £10 deposit money. It was the duty of the directors to cancel the shares and to remove his name from the register of shareholders, but they neglected to do so, and he has a right to come to the Court and have it removed. Mr. *Wallace* not being a rich man wished to consult with others in the same position as himself, and he and they corresponded with the directors who had withdrawn in order to decide upon what should be done, and whether they should exercise their right—hence a little delay took place. The only point is whether Mr. *Wallace* should have commenced an action or taken other proceedings to have his name removed, but looking at the decision in *Reese River Silver Mining Company* v. *Smith* (4) it is submitted that he did all that could be required of him when he shewed that he did not desire to adopt the contract, which was, as is submitted, fraudulent. Being entitled to exercise his option at common law the intention which he shewed to repudiate was amply sufficient. There is nothing in the *Companies Acts* which makes it necessary that a person in Mr. *Wallace's* position should do more than if this had been an ordinary contract. It was not incumbent upon him to bring an action or take a more summary proceeding. If it were said there was delay on Mr. *Wallace's* part, so there was on the part of the directors, who ought to have removed the name: *Nicol's Case* (5). The case is stronger where a name is not removed through the fraud of the company: *Knight's Case* (6); *Lyster's Case* (7). Mr. *Wallace* in due time repudiated the contract, and there arose a positive duty on the part of the directors to remove his name, and it is immaterial whether there was afterwards a winding-up or not. The

(1) Law Rep. 3 Ch. 467.
(2) 34 Beav. 639.
(3) 17 Ch. D. 373.
(4) Law Rep. 4 H. L. 64.
(5) 3 De G. & J. 387.
(6) Law Rep. 2 Ch. 321.
(7) Law Rep. 4 Eq. 233.

directors cannot be heard to say that they made a mistake, or could not accede to the application.

Hare's Case (1) and *Burgess's Case* (2) may be relied on against the application, but the circumstances in those cases were very different, and the former was decided before *Reese River Silver Mining Company* v. *Smith* (3), which must be considered to have laid down the principle that the common law repudiation is quite sufficient.

Hastings, Q.C., and *E. Beaumont*, for the official liquidator, were not called upon.

KAY, J.:—

I do not think it necessary to call upon the other side. When Mr. *Wallace* read the prospectus Messrs. *Gibson & Ross* were *de facto* directors, and there is no mistake as to that fact at all. At the date when Mr. *Wallace* wrote his letter requesting the return of the deposit moneys the contract had been completed by the letter of allotment. It was also a completed contract by the shareholders. The reason given for repudiating the contract was that he had been induced to take the shares by fraud. The company refused to acknowledge his right to repudiate and the parties were then at arm's length.

The question is whether Mr. *Wallace*, considering as I do that the contract had been completed by the letter of allotment, and by him prior to the 27th of November, could on any ground in December repudiate the contract, and I fail to see that he could. It has been urged in argument that there was a fraudulent misrepresentation in the prospectus. But what was it? The only statement complained of was that Messrs. *Gibson & Ross* were directors of the company, and they were in fact at that time directors; and their retirement afterwards did not make that a fraudulent misrepresentation. If Mr. *Wallace* had asked whether they had retired or not, and if they had written to say that they had so done, it would have been futile. In *Hallows* v. *Fernie* (4) a director retired between the application for shares and the

(1) Law Rep. 4 Ch. 503.
(2) 15 Ch. D. 507.
(3) Law Rep. 4 H. L. 64.
(4) Ibid. 3 Ch. 467.

C. A. 1883 *In re* SCOTTISH PETROLEUM COMPANY. Kay, J.

allotment, and Lord Chancellor *Chelmsford* said (1): "I am quite unable to appreciate the objection founded upon a change in the direction, even if that change had been greater than that of one director for another. If the directors were regularly appointed and had duly allotted the Plaintiff's shares, and he retained them, I do not see upon what principle he can now repudiate the contract, because, as he says, he was led to believe that it would be entered into with other parties than those by whom the allotment was made," and affirming Vice-Chancellor *Wood*, he held that as the director named in the prospectus was then a director, his subsequent retirement did not authorize the shareholder to repudiate the contract. That is a distinct authority upon the first point in this case, viz., whether Mr. *Wallace* had or had not a right to repudiate the contract.

But supposing there had been ground for repudiating the contract, is it the law of the Court that a man may lie by from December, 1880, to June, 1882, and then be allowed to take proceedings to have his name, which had all that time been on the register of shareholders, removed—there having been a winding-up order in May, 1881. The law of the Court is that a man must take proceedings to have his name removed with due diligence if he has any complaint to make.

In the *Reese River Silver Mining Company* v. *Smith* (2) an injunction was granted before the winding-up order was made. The plaintiff had not repudiated but had instituted proceedings by filing a bill in Chancery to have his name removed, and Lord *Cairns* (3) referred to that fact.

In *Fox's Case* (4) a shareholder being in a position to file a bill to have his name removed from the register, wrote to the secretary declining to have anything further to do with the company and requesting the return of his deposit moneys. They were returned, his repudiation was thus accepted, but his name remained on the register, and eighteen months afterwards the company was ordered to be wound up, and it was held that he was not a contributory. And in *Pawle's Case* (5) it was decided,

(1) Law Rep. 3 Ch. 473.
(2) Ibid. 4 H. L. 64.
(3) Law Rep. 4 H. L. 81.
(4) Ibid. 5 Eq. 118.
(5) Law Rep. 4 Ch. 497.

where a company was being wound up, that a shareholder who had not taken proceedings was not a contributory; in that case there was an agreement between the solicitors of the company and the ten shareholders who had been acting with one who had filed a bill to be relieved from his shares, that they should not be prejudiced by their not taking proceedings pending the suit, therefore the delay on their part was not material, but the learned Judges in their judgment most plainly shewed that if there had not been an agreement the delay would have been material. Then comes *Hare's Case* (1) where there was no such agreement, and notwithstanding repudiation he was held to be a contributory, and also *Burgess's Case* (2), where a shareholder repudiated his shares and requested that his allotment should be cancelled but did not commence any proceedings, the company was ordered to be wound up and he was held to be a contributory.

The rule is distinctly stated by Lord Justice *Lindley* in the last edition of his work on Partnership, referring to the case of *Reese River Silver Mining Company* v. *Smith* (3) as having laid down the law on the point. I may also refer to *Ashley's Case* (4), where it was held that a shareholder, similarly situated to one who had instituted a suit to be relieved from his shares, who did not promptly inform the company of his intention to claim the benefit of the decision in the suit, was barred by laches from obtaining relief, and was held to be a contributory. The delay was fatal to his application. I must hold that even if Mr. *Wallace* had good ground for repudiating his delay in not resorting to proceedings with activity for the purpose of recovering his deposit moneys when the company distinctly refused to allow him to repudiate, is fatal to his application, and therefore it must be refused with costs.

It was admitted that the decision in Mr. *Wallace's Case* governed the cases of the other applicants.

T. F. M.

C. A.

The applicant appealed, and the appeal was argued on the 16th and 17th of April, 1883.

(1) Law Rep. 4 Ch. 503.
(2) 15 Ch. D. 507.
(3) Law Rep. 4 H. L. 64.
(4) Ibid. 9 Eq. 263.

C. A.

1883

In re SCOTTISH PETROLEUM COMPANY.

Haldane (*Davey*, Q.C., with him), for the Appellants:—

The application for shares was made by *Wallace* on the faith that a certain person was chairman, and another particular person a director, and *Anderson's Case* (1), relating to this same company, shews that shares taken on the faith of this representation, which became untrue before the allotment, could be repudiated. The most recent case on the point is *Smith* v. *Chadwick* (2), where the Master of the Rolls said that if a person such as *Baring* or *Rothschild*, known by all the commercial world, was untruly represented to be a director, the Court would assume that his name was the inducement to take shares, so that the taker would be relieved, and that in the case of a less known person the result would be the same if it was proved that his being a director was a material inducement. That is fully proved here. It is not enough that the representation was true when the prospectus was issued, it must be true when the application for shares was made: *Traill* v. *Baring* (3), which shews the contract to be void. Here *Gibson's* withdrawal was posted before the application for shares. *Davies* v. *London and Provincial Marine Insurance Company* (4), and *Central Railway Company of Venezuela* v. *Kisch* (5), support my contention. *Redgrave* v. *Hurd* (6) shews strongly the difference between an action to rescind the contract and an action of deceit. *Arkwright* v. *Newbold* (7) agrees with *Traill* v. *Baring*, we therefore are entitled to relief on the ground of misrepresentation.

There is another point, which was much relied on in *Anderson's Case*, that only a few shares in the company were subscribed for.

[BAGGALLAY, L.J.:—I do not think that there is anything in that, for there is no stipulation that there shall be no allotment till any particular number of shares has been subscribed for.]

Then I say that there was no valid allotment at all, because it was not made by duly qualified persons. The articles prescribe that the minimum number of directors shall be four. At the

(1) 17 Ch. D. 373.
(2) 20 Ch. D. 27.
(3) 4 D. J. & S. 318.
(4) 8 Ch. D. 469.
(5) Law Rep. 2 H. L. 99.
(6) 20 Ch. D. 1.
(7) 17 Ch. D. 301.

time when this allotment was made there were only three. A quorum of two could act, but they must be a quorum of a duly qualified board. Here I say that *Gibson* and *Ross* never were directors, but if they were they retired before the allotment.

[BAGGALLAY, L.J.:—Could they retire?]

If they could not the only result would be that an action might lie against them for refusing to act, but if they refused to act they cannot be considered directors, the board must have at least four directors who are such both *de facto* and *de jure*.

[FRY, L.J.:—Do you say that a casual vacancy prevents a quorum from acting?]

This was not merely a casual vacancy. I say that there never was a duly constituted board of at least four members. An act done during a casual vacancy might be saved under art. 88, but a vacancy known to the board could be supplied under art. 82, and when the refusals to act were made known to the board, they could not lawfully do anything but fill up the vacancy until the vacancy was filled up.

[BAGGALLAY, L.J.:—What do you say to the clause which provides that continuing directors may act notwithstanding a vacancy in the board?]

That it is qualified by the article which requires a minimum number.

[BAGGALLAY, L.J.:—Up to the first general meeting there could not be more than four directors, so it appears difficult to limit the clause in the way you propose.]

Then, again, I contend that there was no complete allotment. The letter of allotment taken by itself is absolute, but it is accompanied by another letter which is the introduction of a new term. It, therefore, is not an acceptance, but a new offer requiring a fresh acceptance by *Wallace*, and he never did accept.

Supposing, however, that there was a contract to take shares, it was voidable on the ground of misrepresentation, and was sufficiently avoided by the letter of the 27th of November. To make a person a contributory under the *Companies Act*, 1862, s. 23, there must be a binding contract to take shares, which must

C. A. 1883 *In re* SCOTTISH PETROLEUM COMPANY.

be tested by the same rules as any other agreement: *Portal* v. *Emmens* (1). The letter of the 27th of November was a sufficient repudiation, and may be supported by any sufficient grounds which existed, though they may not have been mentioned in it: *Cowan* v. *Milbourn* (2). Such a repudiation would have been sufficient in the case of a going company: *Bwlch-y-Plwm Lead Mining Company* v. *Baynes* (3). The case of *Oakes* v. *Turquand* (4) only decides that in the case of a company there must be a repudiation before the commencement of the winding-up, and all I need shew is that I repudiated before that time: *Fox's Case* (5); *McNiell's Case* (6). There are early cases which say that steps must be taken to get rid of the shares before the winding-up, but they cannot be reconciled with the decision of the House of Lords in *Reese River Silver Mining Company* v. *Smith* (7).

[*Scarf* v. *Jardine* (8) was also referred to.]

As regards the other Appellants than *Wallace* there was an understanding between the company and the Appellants that they and *Wallace* should stand on the same footing as to the right to repudiate. I admit that as regards conditional acceptance the conduct of the other Appellants makes them stand on a different footing, but as regards all the other grounds they have the same case as *Wallace: Stewart's Case* (9).

Hastings, Q.C., and *E. Beaumont*, for the official liquidator:—

If a person's name is found on the register, the burden is on him to shew that it ought not to be there.

[FRY, L.J.:—I cannot agree to that. An act done behind a man's back cannot throw any burden on him; some authority to put his name on the register must be shewn.]

We will take it so. We have applications by the Appellants for shares in the common form, and allotments made to them. They were then placed on the register. It lies on them to shew that the applications and allotments did not constitute contracts

(1) 1 C. P. D. 201, 664.
(2) Law Rep. 2 Ex. 230.
(3) Ibid. 324.
(4) Ibid. 2 H. L. 325.
(5) Law Rep. 5 Eq. 118.
(6) Ibid. 10 Eq. 503.
(7) Ibid. 4 H. L. 64.
(8) 7 App. Cas. 345.
(9) Law Rep. 1 Ch. 511.

to take shares. The objections urged are: 1, that the two directors were not competent to act; 2, that the allotments were conditional offers only; 3, that the contracts were voidable for misrepresentation, and were avoided.

[Baggallay, L.J.:—We do not require to hear you on the first point.]

As to the point that the accompanying letter turned the allotments into fresh offers, it must be observed that the allotments are in the common form. The accompanying letter does not express that the allotment is conditional, and its terms are inconsistent with that view. None of the Appellants except *Wallace* took any notice of the communications. The others received notice of general meetings, and never in any way repudiated the character of shareholders.

As to the right to rescind for misrepresentation, the cases shew that a person who claims relief on this ground must before the winding-up do something which amounts to rescinding the contract, and that it is not enough for him merely to say that he repudiates the agreement without taking any further step. In *Ex parte Stephenson* (1) an action was brought against *Stephenson* for calls. He pleaded that he had been induced to take the shares by the fraud of the company, and got a verdict before winding-up, but had not obtained judgment. It was held that he was a contributory.

[Baggallay, L.J.:—Do you say that nothing short of taking legal proceedings to be relieved from his shares will do? Suppose the company assents to his repudiation.]

If the company assents to his not being a shareholder, that makes a fresh agreement, and is as good as a judgment removing him from the register, but otherwise he must take proceedings. In *Henderson* v. *Lacon* (2) a shareholder who filed a bill before the winding-up was relieved, but the case is expressly put on the ground of his having taken proceedings.

[Fry, L.J.:—Why does rescission of a contract to take shares stand on a different footing from rescission of any other contract?]

On the ground of the policy of the Legislature as to companies.

(1) 16 W. R. 95. (2) Law Rep. 5 Eq. 249.

C. A. 1883 *In re* Scottish Petroleum Company.

A shareholder's name goes out to the world, and creditors trust the company on the faith of his being a shareholder, and other people are induced to take shares because he has done so, and therefore an attempt to repudiate after the winding-up to the prejudice of their rights comes too late.

[Fry, L.J.:—*Ex parte Stephenson* (1) may come to no more than this, that merely defending proceedings is not enough. The report of the case at common law, *Cleveland Iron Company* v. *Stephenson* (2), appears to shew that a right to repudiate was not established. To entitle a shareholder to be relieved he must shew a right to repudiate, and a repudiation in fact.]

In *Pawle's Case* (3) a shareholder who had commenced proceedings before the winding-up was relieved, and so were others who had only repudiated before winding-up, but this was only on the ground that the transactions had been such as to make them virtually parties to the proceedings. In *Ashley's Case* (4) the shareholder was not discharged.

[Fry, L.J.:—In that case there appears to have been no such repudiation as would have prevented the applicant from claiming the shares if the company had proved successful.]

In *Hare's Case* (5) a letter claiming to have the applicant's name removed, but not followed up by any proceedings, was held insufficient. We say, then, that assuming there was a right to rescind, *Wallace* lost it by taking no proceedings before the winding-up. The agreement is *à fortiori* as to the other Appellants, who never even wrote to repudiate their shares.

But we say that a mere change in the directors does not entitle allottees to repudiate: *Hallows* v. *Fernie* (6).

[Fry, L.J.:—Suppose a prospectus setting out a number of persons of high commercial repute as directors. If they all resign before allotment, and a set of persons little known, or unfavourably known, is substituted without the knowledge of the allottee, do you say that he is bound?]

Yes; in the absence of fraud. If a set of distinguished persons

(1) 16 W. R. 95.
(2) 4 F. & F. 428.
(3) Law Rep. 4 Ch. 497.
(4) Law Rep. 9 Eq. 263.
(5) Ibid. 4 Ch. 503.
(6) Ibid. 3 Ch. 467.

who were not going to act were advertised as directors, that would be a fraud, which no doubt would entitle an allottee to relief; but we say that the resignation of persons *bonâ fide* named as directors, and who accepted the office, gives an allottee no ground to complain. The decision in *Anderson's Case* (1) is open to review in this Court, and we submit that it is inconsistent with *Hallows* v. *Fernie* (2), and is not law. But even if it be right, and *Wallace* had a right to repudiate, we rely on the cases which shew that more than a letter repudiating the shares is necessary: *Kent* v. *Freehold Land Company* (3); *Pawle's Case* (4). There is no authority to the contrary, except *Fox's Case* (5), and it cannot be relied on. *McNiell's Case* (6) turned on special circumstances.

Haldane, in reply:—

I regret the absence of Mr. *Davey* in this important case.

[BAGGALLAY, L.J.:—I do not think that your clients have suffered by its being left in your hands.]

I dispute the contention of the Respondents that there is no authority for giving effect to a mere letter of repudiation, except *Fox's Case*. *Hallows* v. *Fernie* does not conflict with *Anderson's Case*. *Gibson* had written to withdraw before *Wallace's* application. A contract to remain a director is one of which there cannot be specific performance, and if a director withdraws, whether his withdrawal is rightful or not, he is no longer a director. In *Smith* v. *Chadwick* (7) the late Master of the Rolls laid down that the contract could be rescinded if the application for shares had been made on the faith of the name of a person who had ceased to be a director. The letter which accompanied the letter of allotment was such a qualification as made the allotment not an acceptance but a new offer: *Pollock* on Contracts (8); and this new offer was repudiated. A winding-up relates back, but there is no authority which says that an order on an application to take a name off the register relates back to the time of

(1) 17 Ch. D. 373.
(2) Law Rep. 3 Ch. 467.
(3) Ibid. 3 Ch. 493.
(4) Ibid. 4 Ch. 497.
(5) Law Rep. 5 Eq. 118.
(6) Ibid. 10 Eq. 503.
(7) 20 Ch. D. 27, 50.
(8) Page 21.

C. A. 1883 *In re* SCOTTISH PETROLEUM COMPANY.

application. The cases are all made consistent by holding that nothing more is required than that a distinct repudiation precluding the allottee from ever claiming the shares should be made before the commencement of the winding-up. A partner who seeks to be relieved from the partnership cannot be relieved as against creditors, but the case of an allottee is different, for if he is induced to take shares by misrepresentation he never is properly on the register: *Ex parte Kintrea* (1). Estoppel as regards outside creditors does not arise in joint stock companies until insolvency is made known: *Tennent* v. *City of Glasgow Bank* (2). *Kent* v. *Freehold Land Company* (3) is inconsistent with *Reese River Silver Mining Company* v. *Smith* (4) and almost all the cases cited against the Appellants are prior to this latter decision. If *Ex parte Stephenson* (5) goes the full length of the proposition to prove which it is cited it is inconsistent with that decision, and so is *Henderson* v. *Lacon* (6), if it decides that filing a bill is requisite. *Wright's Case* (7) shews that filing a bill is not necessary, and *McNiell's Case* (8) governs the present.

[BAGGALLAY, L.J.:—What is there here which corresponds to the pending proceedings in that case?]

Anderson's proceeding. *Fox's Case* (9) is in my favour.

[BAGGALLAY, L.J.:—There the directors had acceded to the demand.]

If the company is in default for not taking the name off before the winding-up, the allottee can come to be relieved after the winding-up unless there is other laches to alter the right. *Hare's Case* (10) and *Pawle's Case* (11) only follow the principle of *Oakes* v. *Turquand* (12) which is nothing more than that there must be repudiation before the commencement of the winding-up. In *Burgess's Case* (13) it does not appear that there ever was any right to be relieved at all.

(1) Law Rep. 5 Ch. 95.
(2) 4 App. Cas. 615.
(3) Law Rep. 3 Ch. 493.
(4) Ibid. 4 H. L. 64.
(5) 16 W. R. 95.
(6) Law Rep. 5 Eq. 249.
(7) Law Rep. 7 Ch. 55.
(8) Ibid. 10 Eq. 503.
(9) Ibid. 5 Eq. 118.
(10) Ibid. 4 Ch. 503.
(11) Ibid. 497.
(12) Ibid. 2 H. L. 325.
(13) 15 Ch. D. 507.

April 28. BAGGALLAY, L.J.—

On the 27th of May, 1881, an order was made for winding up the *Scottish Petroleum Company, Limited*. At the commencement of the winding-up the names of *R. Black*, *J. Calder*, *F. Graham*, and *A. P. Wallace*, were on the register of members of the company, and they were accordingly placed by the official liquidator on the list of contributories. On the 22nd of July, 1882, they applied to Mr. Justice *Kay* to remove their names from the list, and from the dismissal by him of their application the present appeal is brought.

The general rules by the application of which questions similar to those which arise upon the present appeal must be determined are well known, and no dissent from or modification of such rules, has been suggested in the course of the arguments which have been addressed to us. They may be concisely stated as follows:—

1. Every person who has agreed to become a member of a company, and whose name has been entered on the register of members, is liable as a contributory in the event of the company being wound up. This is, in substance, the combined effect of the 23rd, 38th, and 74th sections of the *Companies Act*, 1862.

2. But the proposition thus generally stated is subject to the application of the well-recognised rule in Equity that a person who has been induced to enter into a contract by the fraudulent conduct of those with whom he has contracted is entitled to rescind such contract provided he does so within a reasonable time after his discovery of the fraud. In such cases the contract is voidable, not void.

3. And this last-mentioned rule, in its application to contracts to take shares in a company which is subsequently ordered to be wound up, has been modified to this extent, that the contract must be avoided, or that must be done which is recognised as equivalent to avoidance, before the commencement of the winding-up. This last rule has been established by a series of well-known cases, to some of which I shall have occasion to refer presently. The grounds upon which it has been held that equities which would be sufficient as between the shareholder and the company cannot be set up against the creditors or co-contributories are fully explained in those cases. Whether that which has been

C. A.
1883
In re SCOTTISH PETROLEUM COMPANY.
Baggallay, L.J.

done in any particular case ought to be regarded as equivalent to an avoidance of a voidable contract is a question the solution of which must depend upon the circumstances of each case.

In that with which we have now to deal it has been contended on the part of the Appellant:

1. That there was no binding agreement on the part of any of the Appellants to take shares in the company. If this be so, their names were improperly entered on the register of members, and they are entitled to have their names removed from the list of contributories.

2. That if any such agreements were entered into by the Appellants they were induced to enter into them by the fraudulent misrepresentations of the directors, and that the contracts were consequently voidable at the instance of the Appellants.

3. That that which was done by the Appellants before the commencement of the winding-up of the company was equivalent to an avoidance of the contracts so entered into by them.

The cases of the four Appellants are substantially the same, the differences, which are in detail only, being but trifling. Mr. *Haldane* very fairly admitted at the commencement of his argument that unless he could succeed in supporting the case of Mr. *Wallace* he should hardly hope to support that of the other Appellants, and to the case of Mr. *Wallace* he first and chiefly directed our attention. I will adopt the same course.

Mr. *Haldane's* first contention was that there was not at any time a concluded agreement on the part of Mr. *Wallace* to take shares in the company. To constitute a binding contract to take shares in a company when such contract is based upon application and allotment, it is necessary that there should be an application by the intending shareholder, an allotment by the directors of the company of the shares applied for, and a communication by the directors to the applicant of the fact of such allotment having been made. It is not disputed that Mr. *Wallace* applied for ten shares, but it is contended on his part that there was no valid allotment to him, and that, even if there was a valid allotment, the fact of the allotment having been made was not effectually communicated to him.

In support of the first point that there was no valid allotment, the argument was as follows: The articles provided that the number of directiors should not be less than four or more than seven; and they appointed in the first place only the minimum number. It is contended, and perhaps rightly, on behalf of Mr. *Wallace* that two of these four directors had ceased to be directors before the allotment was made, and it is also contended that though by the articles two directors form a quorum when the board is duly constituted, there could not be a quorum capable of transacting business when the board of directors was not filled up to the minimum number. I assume that the retiring directors had ceased to be directors, and if that be so, the board was not made up to the minimum number. Still I think that, having regard to art. 83, the objection cannot be maintained. It is urged that this article can only apply when the number of directors is more than four, but I see no reason for adopting that view. The number of directors never exceeded four, and there might be a vacancy, in which case, according to the terms of art. 83, the continuing directors could act. A quorum of two was therefore competent to allot shares.

Then, assuming that there was power to allot, was an allotment communicated to Mr. *Wallace?* The allotment purported to be made on the 12th of November, 1880, and on the same day the secretary addressed to Mr. *Wallace* the following letter:—"The directors have in accordance with your application allotted to you ten shares in this company. Due notice will be given when the certificates are ready." This taken alone is a clear notice of allotment. The argument for Mr. *Wallace* is founded on this, that the effect of the contemporaneous letter from the secretary to Mr. *Wallace* is to introduce a new term, so that taking the two letters together there was no unconditional acceptance by the directors of Mr. *Wallace's* offer to take shares. Mr. *Wallace* says, "I understood that four specified persons were directors, you inform me that two of them are not, so I consider that you have made no good allotment to me." I cannot take that view. It is suggested that this cotemporaneous letter was written for the purpose of allowing the allottee to withdraw his application, and at first I was inclined to that view; but I do not on further consideration think that this

C. A. 1883 *In re* SCOTTISH PETROLEUM COMPANY. Baggallay, L.J.

was the intention. A notice of allotment was sent, and at the same time a piece of information was given which might be of importance or interest to the allottee. It may be that the retirement of the directors gave the allottee a right to rescind the contract, as I think it did; but the present question is, whether it introduced a new term so as to entitle the alleged allottee to say that there was no contract at all. It seems to me that there was a complete acceptance, though accompanied by a communication of a piece of information which might entitle the allottee to repudiate the allotment, and I therefore think that the argument of there having been no contract fails.

Assuming, then, that there was a contract, Mr. *Wallace* contends that he was entitled to be relieved from it on the ground of misrepresentation, and on this point I am in his favour. Apart from the decision of Vice-Chancellor *Malins* in *Anderson's Case* (1) it appears to me that the representation as to the persons who were to be directors was very material. Here was a company formed for carrying on a business in *Paris*, and four directors were named, *Gibson* and *Ross*, resident in *London*, a third in *Paris*, and the fourth in *Fifeshire*. It is clear that the Appellants relied on the fact of *Gibson* being a director, and as to Mr. *Wallace* the case goes further, for he corresponded with *Gibson* as to the company. I do not say that this correspondence is to be taken into consideration as regards there having been a misrepresentation, but it supports the view that Mr. *Wallace* applied for shares on the faith of *Gibson* being a director. I do not go further into this, for *Anderson* applied to have his name taken off the register on the ground of the change in the body of directors, and Vice-Chancellor *Malins* decided that it must be taken off, for that the misrepresentation was such as entitled him to rescind, and that as he had applied within a reasonable time his name must be taken off. I am therefore with Mr. *Haldane* in the contention that there was a misrepresentation which made the contract voidable.

Then the question is, had Mr. *Wallace* done that which is equivalent to avoiding the contract before the winding-up commenced. The general principles applicable to these cases are to be gathered

(1) 17 Ch. D. 373.

from *Oakes* v. *Turquand* (1), *Kent* v. *Freehold Land Company* (2), and *Reese River Silver Mining Company* v. *Smith* (3). In *Oakes* v. *Turquand* no step was taken till after the winding-up had commenced, and the applicant was held to be too late. In *Kent* v. *Freehold Land Company* a bill was filed after the commencement of the winding-up and was held too late. In *Reese River Silver Mining Company* v. *Smith* a bill by the shareholder to have his name removed was filed before the petition to wind up, and he was held entitled to relief. These cases shew that an equity which would entitle a shareholder to be relieved from shares in a going company will not entitle him to relief if brought forward for the first time after the winding-up has commenced.

A series of other cases has somewhat narrowed the application of this rule. Some of the most interesting and instructive are the three cases in *In re Estates Investment Company*. In *Pawle's Case* (4) *Ross*, who was acting in concert with ten other shareholders, filed a bill to have his name removed from the register on the ground of misrepresentation, and it was agreed with the company that the other ten should not be prejudiced by their not taking proceedings pending the suit. A decree was made for removing *Ross's* name, and pending an appeal from this decree an order was made for winding up the company. The decree was affirmed. *Pawle*, one of the ten, claimed to be excluded from the list of contributories, and it was urged that he was too late; but it was held that the agreement with the company was sufficient to prevent the application of the rule and he was excluded from the list. *McNiell's Case* (5) went rather farther. *McNiell* had nothing to do with *Ross's* suit or the arrangement, but he had expressly repudiated his shares and refused to pay calls, and the directors had given notice to the shareholders that legal proceedings against shareholders who refused to pay calls would be suspended till *Ross's* suit was decided. It was held that he was entitled to relief. But in *Ashley's Case* (6) it was held that *Ashley*, who had not expressly repudiated his shares, was in a different

(1) Law Rep. 2 H. L. 325.
(2) Ibid. 3 Ch. 493.
(3) Ibid. 4 H. L. 64.
(4) Law Rep. 4 Ch. 497.
(5) Ibid. 10 Eq. 503.
(6) Ibid. 9 Eq. 263.

C. A. 1883 *In re* SCOTTISH PETROLEUM COMPANY. Baggallay, L.J.

position, for he had done nothing to repudiate his shares before the winding-up, and must be a contributory.

The cases appear to establish that to enable a shareholder to escape there must before the commencement of the winding-up be a repudiation of the shares, and that it must be followed up by active steps to be relieved from them, unless there is some agreement with the company which dispenses with the necessity of proceedings being taken by this particular shareholder.

That mere repudiation not followed up by anything more is insufficient was decided in *Hare's Case* (1). It was a hard case, for there had been a compromise by which the names of the repudiating shareholders were to be removed, but *Hare* was not a party to these proceedings, and nothing was proved as regards him except that he had expressly repudiated his shares before the commencement of the winding-up. It was held that he was a contributory.

In the present case there was no doubt an express repudiation, for Mr. *Wallace*, on the 27th of November, 1880, wrote to withdraw his application for shares on the ground of the change in the board, and requested a return of his deposit. This was met by a demand of the £2 per share payable on allotment. The delay of a fortnight in repudiating the shares makes it, to my mind, doubtful whether the repudiation in the case of a going concern would have been in time. No doubt where investigation is necessary some time must be allowed, as in *Central Railway Company of Venezuela* v. *Kisch* (2). But where, as in the present case, the shareholder is at once fully informed of the circumstances, he ought to lose no time in repudiating. But suppose the repudiation had been made on the next day, what has Mr. *Wallace* done since? His repudiation was met by a letter insisting on retaining him as a shareholder, and claiming the allotment money. He took no further step. If the matter rested there he is clearly within *Hare's Case*.

It was urged that both parties treated *Anderson's Case* (3), which was decided on the 3rd of February, 1881, as deciding the matter in dispute between them. But there was no communication

(1) Law Rep. 4 Ch. 503. (2) Law Rep. 2 H. L. 99.
(3) 17 Ch. D. 373.

between Mr. *Wallace* and the company on the subject. The company sent him notices of meetings, one of which was sent soon after the decision in *Anderson's Case* (1), and the other subsequently, thus treating him as a shareholder and keeping him at arm's length. Having regard to all these circumstances, I am of opinion that Mr. *Wallace* did not before the winding-up do what, according to the circumstances, is equivalent to an avoidance of the contract, and he is practically in precisely the same position as the applicant in *Hare's Case* (2). The appeal will therefore be dismissed. It is unnecessary to refer to the case of the other Appellants, as their position is clearly less favourable than that of Mr. *Wallace*.

LINDLEY, L.J.:—

I am of the same opinion, and shall add a few remarks, for after the elaborate argument of Mr. *Haldane* I thought it desirable to look through the cases.

The first question is, whether the allotment was good for anything. It is contended that there were no directors who could make an allotment, because there was not a board of four; but looking at arts. 66, 67, 83, 84, and 88, I think this objection cannot be maintained. At the time of this allotment, however, there was a material change in the body of directors. The secretary, acting honestly and fairly, drew the attention of the allottees to the fact. Mr. *Haldane* argued that this change made the contract void, and referred to *Traill* v. *Baring* (3). I think that case does not bear out his proposition, and goes no further than to shew the contract to be voidable.

There was then an application by Mr. *Wallace* and an allotment of shares to him under a changed state of circumstances, which entitled him to repudiate the shares. He did repudiate them by a very clear letter. In the meantime he had been placed on the register of shareholders. If we could decide the case on the principles generally applicable to contracts, Mr. *Wallace* would be entitled to relief. But in the case of shares in a company the shareholder must, before the commencement

(1) 17 Ch. D. 373. (2) Law Rep. 4 Ch. 503.
(3) 4 D. J. & S. 318.

C. A. 1883 *In re* Scottish Petroleum Company. Lindley, L.J.

of the winding-up, have done something to alter his *status* as member. Mr. *Wallace* by letter repudiated his shares and asked for a return of his deposit, but he did nothing else. The company refused to accede to his renunciation of his shares. A shareholder named *Anderson* took proceedings to be relieved from his shares on the same ground as that alleged by Mr. *Wallace*, and was held entitled to relief. The company was then a going concern. I assume that decision to have been right, but there is no evidence of any agreement that the company should be bound as between them and all the other shareholders by the result of that case. There may have been a sort of vague understanding that it would be so, but there is nothing like an agreement to stand or fall by the result of *Anderson's Case* (1), and after that decision the company continued to treat Mr. *Wallace* as a shareholder by sending him notices of meetings.

As regards the cases, the present is not like *Oakes* v. *Turquand* (2) or *Ashley's Case* (3), for in neither of those cases was there any repudiation at all before the commencement of the winding-up. But in *Kent* v. *Freehold Land Company* (4) there was. Lord *Cairns* there begins by saying that he cannot see any distinction between that case and *Oakes* v. *Turquand*. He cannot have overlooked the fact that there was in one case a repudiation before the winding-up and that in the other there was not; and he must have meant that a mere repudiation not followed before the winding-up by any steps to have the name taken off the register did not make any substantial difference. This is illustrated by *Pawle's Case* (5), and the point arose more distinctly in *Hare's Case* (6), where a shareholder who had repudiated his shares before the winding-up, but had taken no steps to have his name removed from the register, was held to be a contributory.

If we look at these cases to see what principle is to be deduced from them, I think we find that the shareholder who seeks to be discharged must have done two things: he must have repudiated the contract and have got his name taken off the register, subject to the qualification that if he has before the commencement of the

(1) 17 Ch. D. 373.
(2) Law Rep. 2 H. L. 325.
(3) Ibid. 9 Eq. 363.
(4) Law Rep. 3 Ch. 493.
(5) Ibid. 4 Ch. 497.
(6) Ibid. 503.

winding-up taken proceedings to have his name removed, that will be sufficient. There is a further encroachment on this rule, namely, that if one shareholder commences a litigation to have his name removed, and there is an agreement between the company and other repudiating shareholders that all the cases shall stand or fall by the result of his litigation, then if that case is decided in favour of the litigant shareholder the others will be relieved: *Pawle's Case* (1). But there is no authority that can be relied on for carrying the modification of the rule any further. I say none that can be relied on, for there is a case, *Fox's Case* (2), which it is difficult to reconcile with the principle established by *Oakes* v. *Turquand* (3) and *Kent* v. *Freehold Land Company* (4). The general principle was carried out in *Burgess's Case* (5), which is an important case, because there was money in hand sufficient to pay the creditors, so it might forcibly be urged that the doctrine of *Oakes* v. *Turquand* did not apply; but the Master of the Rolls held that as the shareholder had not taken steps before the winding-up to alter his *status* as between himself and the other shareholders he was bound. The rule is, that the repudiating shareholder must not only repudiate, but also get his name removed, or commence proceedings to have it removed, before the winding-up; but this rule is subject to the qualification, that if one repudiating shareholder takes proceedings the others will have the benefit of them if, but only if, there is an agreement between them and the company that they shall stand or fall by the result of those proceedings, but not otherwise.

I am of opinion on these grounds that the appeal must be dismissed, and I am not sure that I should not have come to the same conclusion on the ground that Mr. *Wallace* was guilty of laches in not repudiating earlier, but it is not necessary to resort to that ground.

FRY, L.J.:—

The questions for decision are (1), was there a concluded contract by Mr. *Wallace* to take shares? (2) If there was, had he a right to avoid it, and did he avoid it?

(1) Law Rep. 4 Ch. 497.
(2) Ibid. 5 Eq. 118.
(3) Law Rep. 2 H. L. 325.
(4) Law Rep. 3 Ch. 493.
(5) 15 Ch. D. 507.

C. A.
1883
In re SCOTTISH PETROLEUM COMPANY.
Fry, L.J.

As regards the first point, I agree in the conclusion that the two directors were competent to act. Then did they unconditionally accept Mr. *Wallace's* offer, or did they by their answer introduce a new term? This is a question of the construction of the letters, and I think that on their true construction a contract was entered into. It is only by laxity of language that a mere statement of fact can be called the introduction of a new term. I am of opinion, therefore, that there was a concluded bargain.

Had then Mr. *Wallace* a right to repudiate this bargain by reason of the change of circumstances? I see no reason to dissent on this head from the opinions expressed by Lord Justice *Baggallay*. I agree with the observations of Lord Justice *Turner* in *Traill* v. *Baring* (1): "I take it to be quite clear, that if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances; and that this Court will not hold the party to whom the representation has been made bound unless such a communication has been made." I think then that here the communication of the alteration of circumstances gave Mr. *Wallace* a right to repudiate or not as he thought fit. Did he repudiate? In the case of ordinary contracts if they are voidable an express repudiation avoids them, and if this had been the case of an ordinary contract I think that Mr. *Wallace's* letter of the 27th of November would have been a sufficient repudiation, supposing it to have been sent in time. Whether it was sent in time we need not determine, for this is not the case of an ordinary contract, but of a contract to take shares, which stands on a different footing. As regards such contracts the Legislature has interposed, and has provided that they shall be made known in a particular way to shareholders and creditors; notice of them is

(1) 4 D. J. & S. 318, 329.

given to the world. Now the general principle is that no contract can be rescinded so as to affect rights acquired *bonâ fide* by third parties under it. It is true that the creditors and the other shareholders have not acquired direct interests under the contract, but they have acquired an indirect interest. The shareholders have got a co-contributory, the creditors have got another person liable to contribute to the assets of the concern. So that although in the case of ordinary voidable contracts simple repudiation is enough, there must in the case of a voidable contract to take shares be repudiation and something more before the winding-up commences.

What more then is enough? If the name is removed, that is of course enough. It is enough if before the commencement of the winding-up the shareholder takes proceedings to get his name removed and duly prosecutes them. How the case would stand if they were not duly prosecuted it is unnecessary to decide. It has also in some cases been held that something short of this will do, but I agree with Lord Justice *Lindley* that these are encroachments upon the general rule, and I do not think that they ought to be extended.

In the present case Mr. *Wallace* after his letter of the 27th of November, 1880, did nothing. He neither obtained the removal of his name from the register, nor took any proceedings to get it removed. I am of opinion therefore that though he had repudiated the contract by letter in a way which in the case of an ordinary contract would have been sufficient, he having done nothing more, has not done what is necessary to enable him to get rid of his shares, and that he is a contributory.

Solicitors for Appellants: *Parker, Garrett, & Parker.*
Solicitor for Official Liquidator: *Felix Carter.*

H. C. J.

C. A. 1882 Dec. 19, 20.

In re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.

Building Society—Borrowing Powers—Unlimited Power of borrowing — Deposit of Deeds—Paid-up Preference Shares — Winding-up — Priority — 6 & 7 Will. 4, *c.* 32 [*Revised Ed. Statutes, vol. vii. p.* 1013]—37 & 38 *Vict. c.* 42, *ss.* 8, 15; 38 & 39 *Vict. c.* 9—*Interval between Act and Repealing Act —Effect of Certificate of Barrister—Amendment of Rule—Rule acted on notwithstanding Disallowance.*

A rule giving an unlimited power of borrowing money to the directors of a building society is void, although it was certified by the certifying barrister. And persons advancing money under it on the security of the deposit of the title deeds of borrowing members, must, in the winding-up of the society, give up their securities, and prove against the residue of the assets after payment of the outside creditors and unadvanced members.

A rule giving the directors power to issue deposit or paid-up shares at a fixed rate of interest with the right to withdraw the money in preference to the ordinary unadvanced members, is valid, and the holders will be entitled in the winding-up of the society to be paid in preference to the unadvanced members.

The effect of sect. 1 of the *Building Societies Act*, 1875, repealing sect. 8 of the *Building Societies Act*, 1874, is that all deposits with and loans to a building society certified under 6 & 7 Will. 4, c. 32, made in the interval between the 2nd of November, 1874, and the 22nd of April, 1875, are valid; but deposits and loans made before the 2nd of November, 1874, if otherwise invalid, are not made valid thereby, although they may be continued during that interval.

Securities given by a building society may be enforced against the society although sects. 14 and 15 of the *Building Societies Act*, 1874, are not indorsed thereon; the enactment in sect. 15 directing this to be done being only directory.

The certifying barrister struck out a rule of a building society, but the directors notwithstanding printed and acted upon it. Some years afterwards, the rule was amended and the barrister certified the amendment:—

Held, that the effect of his certificate was to make valid the whole rule as amended.

THIS was an appeal from a decision of Mr. *H. F. Bristowe*, the Vice-Chancellor of the Duchy of *Lancaster*.

The *Guardian Permanent Benefit Building Society* was enrolled in the year 1870 under the 6 & 7 Will. 4, c. 32, and carried on business at *Manchester*.

The rules, as in similar societies, provided both for borrowing

and investing, or non-advanced, members, and contained, among others, the following provisions:

Sect. 5 provided for the payment of the subscriptions and fines of members, and contained a clause that members might pay in advance any number of shares or half shares in accordance with Investors' Table No. 2.

Sect. 20 related to advances to members requiring them. It provided that the secretary should from time to time send notice to each such member in rotation, informing him of the time of inspection; and that the amount of advance should be according to the tables, less such deductions as were provided by the rules.

Sect. 31 was as follows: "The board for the time being shall have power as circumstances may require to issue deposit or paid-up shares of the value of £30 each, upon a certificate bearing interest after the rate of £5 per cent. per annum, and such certificate shall entitle the depositor (after one month's notice in writing, to be reckoned from a monthly meeting) to withdraw the whole or part of his deposit in preference to all other shares. The form of certificate shall be the same as set forth in the schedules to these rules."

Sect. 32 provided that "The trustees or directors for the time being of this society may, from time to time, as occasion may require, borrow and take up at interest any sum or sums of money from the society's banker, or from any banker, or from any other person or persons; and any borrowed money shall be a first charge on the funds and property of the society. And in case the trustees or directors shall at any time give their joint or several promissory note, or other security for money borrowed for or on behalf of the society, then and in such case, the persons giving the security shall be indemnified by the society, and the funds and property of the society shall be held subject to the repayment of the borrowed moneys; the borrowed moneys being always deemed a first charge on the society's funds and property."

Sect. 37 provided that if a loss should arise which the contingent fund should be insufficient to make good, or if from any other reason the board should deem an augmentation of the contingent fund necessary or expedient, the board should direct a levy of such a sum on every share or half share advanced and

C. A. 1882 *In re* GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.

unadvanced as would cover all deficiency. But it was provided that no levy of any sum should be made on or in respect of any deposit, or paid-up share, referred to in section 31.

Sect. 41 provided that any member might withdraw unadvanced shares on giving one clear month's notice; the amount payable on withdrawals shall be determined by the said tables. All unadvanced shares which according to the said tables should have accumulated to the full value of £120 should be considered due and payable on demand. Withdrawals were to be payable in rotation according to the priority of notice. The board might limit the number of withdrawals to be paid off in any one month.

Sect. 44 provided that whenever there was any balance at the bank not wanted for advances or other claims, the board might at any monthly meeting cause the members of the society who had not received advances either to take an advance as before provided or to withdraw by ballot as many shares as should be sufficient to exhaust the balance.

The rules were followed by two tables, of which Table No. 1 shewed the accumulations of an ordinary share, and No. 2 shewed the accumulations of a paid-up share.

These rules, after being printed, were submitted to the barrister appointed to certify the rules of benefit building societies, who certified them all with the exception of sect. 31, which he struck out. That section was, however, retained uncancelled among the printed rules, and the society obtained considerable sums of money by the issue of preference shares under it.

In the year 1876 the society altered several of their rules, and, among others, amended section 31, as follows: "Section 31. Omit £30 and insert £1 in line 3." This alteration, together with the others, was certified by the barrister, apparently in forgetfulness of his having disallowed section 31.

The effect of the alteration was to convert the £30 preference shares into £1 preference shares; and all the persons who had taken £30 preference shares exchanged them for £1 shares of the same class; and several other persons subscribed and paid for £1 shares.

The society from time to time issued advertisements and circulated reports inviting the public to make advances to it.

The society borrowed large sums of money under the 32nd section of the rules, and also issued preference shares to a large amount under the 31st section; they also were in the habit of overdrawing their account at their bankers to a considerable extent. The moneys so obtained were advanced to the borrowing members on mortgage. Reports were issued every year to the members, which contained a balance sheet shewing the amount of these transactions, and containing the initials of the persons who had taken preference shares and advanced money to the society.

The holders of these preference shares were not entered on the list of members of the society in respect of these shares, nor credited with any bonuses or profits. Nor did they vote at the meetings of the society.

On the 14th of November, 1881, an order was made in the Court of the Vice-Chancellor of the Duchy of *Lancaster* to wind up the society.

The assets of the society consisted of £81,500, or thereabouts, due from advanced members on mortgage; but the value of the securities was insufficient to cover the sums owing. The liabilities of the society on account of ordinary debts, exclusive of loans from persons not members under sect. 31, was only about £229. The claims of persons who had lent money to the society under sect. 32 amounted to about £58,907, of which about £21,088 was covered by securities given by the society.

The amount claimed by unadvanced members in respect of their shares was about £7413.

The claims of holders of preference, or deposit, shares amounted to £14,282, of which about half were issued after the alteration of rule 31 in 1876.

On the 25th of June, 1874, Mrs. *Crace-Calvert* advanced to the society £2000, which was applied in the ordinary course in reduction of the balance due to the bankers, which at that time was overdrawn to the amount of £4530. Mrs. *Crace-Calvert* received two promissory notes for £1000 each from the trustees of the society, and a deposit of certain title deeds of property which had been mortgaged to the society by some of the advanced members. On the 3rd of July, 1875, she advanced a further sum

C. A. 1882 — *In re* GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.

of £2000 on similar security, which was applied in like manner in reducing the society's overdraft at their bankers. Some portion of the money advanced by Mrs. *Crace-Calvert* had been repaid to her, but £2600 still remained due.

Mrs. *Crace-Calvert* applied for a declaration that she had a valid charge on the property comprised in the deeds deposited with her, and an order that the property might be sold and the proceeds applied in payment of her debt, and that if the proceeds were insufficient, she might be admitted to prove against the assets of the society for the balance.

The claim of Mrs. *Hawkins* was considered at the same time. Her case differed from that of Mrs. *Crace-Calvert*, inasmuch as she had made her advances in December, 1874, and January, 1875, at the time when the *Building Societies Act* of 1874 was in force, but without any security except the promissory notes of the trustees.

It appeared that the 14th and 15th sections of the Act of 1874 were not printed at the back of the promissory notes, as required by the 15th sub-section of sect. 5 of the Act.

The Vice-Chancellor gave judgment in favour of Mrs. *Crace-Calvert*, but decided that Mrs. *Hawkins* was not entitled to the benefit of her security, but could only prove for her loan against the assets of the society (1).

(1) 1882. May 12. Mr. H. F. BRISTOWE, V.C., after stating the facts, so far as they related to Mrs. *Crace-Calvert's* application, continued as follows:—

It is material to notice the dates when the advances were actually made by Mrs. *Crace-Calvert*, namely, the 25th of June, 1874, and the 3rd of July, 1875. The former date is prior and the latter subsequent to, the passing of the *Building Societies Act*, 1874, which Act took effect on the 2nd of November of that year. But this Act was repealed, so far as sect. 8 is concerned, by the *Building Societies Act*, 1875, passed on the 22nd of April, 1875; and therefore the loans made on the 25th of June, 1874, and the 3rd of July, 1875, are not, in my judgment, affected by the Acts in question. It was argued that Mrs. *Crace-Calvert* had suffered the loans made on the 25th of June, 1874, to remain after the passing of the Act of 1874 from the 2nd of November, 1874, till the 22nd of April, 1875, and that, therefore, her loan to that extent was made valid by the Act of 1874. In my judgment that is not so; and the Acts in question have not any effect upon her loans.

Then it was urged on her behalf that although the society had no authority to borrow, and though the Act did not validate the loans, yet that as the mortgages given to the society were bound to contain powers

CALVERT'S CASE.

C. A.
1882
In re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.

The official liquidator appealed from the judgment in this case.

Ambrose, Q.C., *Maberly*, and *Edwin Jones*, for the Appellant:—

It is admitted that sect. 32 of the rules is *ultrà vires*, and that the society had no borrowing powers which justified the advances

---

of sale, and as the right to transfer the securities given would also be vested in the trustees, the deposits of the deeds made to Mrs. *Crace-Calvert* must be treated as transfers of the securities and *quasi* sales empowering her to hold the properties comprised in the deposits as purchaser thereof in equity. It is, in my judgment, difficult to follow this argument, because if there be no power to borrow at all, the deposit of deeds, which is an integral part of the borrowing, is as bad as the borrowing; and if the case rested on this ground alone I should not see my way to decide in favour of the depositee. But the real and substantial question appears to me to be this: As Mrs. *Crace-Calvert's* money undoubtedly came into the hands of the society at the solicitation of the trustees thereof, and was used and applied for the purposes of the society, is it equitable that on the final winding-up of the society the members thereof, who had the full advantage of her money, should now be entitled to take away the securities given to her and also to take and to hold for their own benefit the money undoubtedly lent by her and secured as already mentioned?

In my judgment they are not so entitled. In the first place I should observe that I am not aware of any decision exactly governing this and the other cases now before me; but bearing in mind that this is in fact the final adjustment of the assets of the society after payment of all outside debts, and the costs of the liquidation, it appears to me to be inequitable to say that the money paid into the coffers of the society by persons making advances at the solicitation of the society, through its officers, should be retained by the members of the society, and that they should at the same time be entitled to repudiate the securities given when the money was advanced, and to have such securities realized and applied for their own benefit. It may be that the money was taken by the society without proper authority, and therefore in that sense illegal; but the question really is who, upon the final winding-up of the society, is entitled to the money which was actually, though in one sense illegally, advanced? No doubt, in the first place, all the outside debts must be paid; they are but small and can be easily satisfied. Then the costs of the winding-up must be provided for. Assuming that to be done, there will still remain a considerable surplus of assets. In my judgment those persons who, like Mrs. *Crace-Calvert*, have *bonâ fide* advanced money to the society upon the solicitation of the society, through its officers and trustees, though not creditors of the society in such a way as to entitle them to a winding-up order, which was the point really decided by Lord Justice *Giffard* in *Ex parte Williamson* (Law Rep. 5 Ch. 309), are yet entitled to hold the securities given to them, and are not bound

C. A. 1882

In re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.

by Mrs. *Crace-Calvert*. Those advances went to pay the society's overdraft on their bankers, which was also illegal. The borrowing to give them up to the official liquidator for realization on behalf of the society. My judgment upon this point is very much based upon the recent decision of Vice-Chancellor *Bacon* in *Wilson's Case* (Law Rep. 12 Eq. 516), and I hold here, as Vice-Chancellor *Bacon* did there, that the official liquidator is not entitled, without payment of the money advanced, to deprive the lender of her securities. I think, therefore, that she is entitled to have those securities realized for her benefit, and to have payment made to her of her debt.

There remains, however, the further question whether if the securities realized do not pay her in full, she will be entitled to prove against the general assets of the society for the balance. This question may affect other cases besides that of Mrs. *Crace-Calvert*; but to confine myself for the present to her case, in my judgment the true solution of the question does not rest upon whether Mrs. *Crace-Calvert* could or could not in respect of that balance be treated as an ordinary creditor of the society, but whether upon the final adjustment of the whole of the affairs of the society she is not entitled to receive back out of the assets of the society, after all the outside claims have been fully discharged and satisfied and all costs paid, such proportion of the assets remaining in the coffers of the society as would represent money lent by her to the society and not repaid. That she could not be an ordinary creditor must, I think, be admitted after the decision of *Ex parte Williamson* (Law Rep. 5 Ch. 309), already referred to; and that she could not have been entitled to a winding-up order as a creditor must also be admitted. But although the point is, I believe, untouched by authority, I come to the conclusion that it would be inequitable for the members of the society who have received Mrs. *Crace-Calvert's* money, and had the benefit of it, to say, "The society is now wound up; all outstanding debts and claims have been paid; all costs have been paid, and there is a substantial residue. We, the members of the society, will take that and divide it amongst ourselves, because you and others had no right to lend it to us—you did wrong in lending it to us, and we did wrong, through our trustees, in taking it, but as we have got it, we will keep it, and you shall not recover it from us." That appears to me a very inequitable claim, and I therefore hold that Mrs. *Crace-Calvert* is entitled to prove against the assets of the society in the winding-up for so much of her advances as may not be realized by her securities.

The next case is that of Mrs. *Hawkins*. She claims priority for her debt over all other persons who are not in her precise position, and she rests her claim mainly on the following ground:

Both of her loans of £1000 were made in the gap between the 2nd of November, 1874, when the Act of 1874 took effect, and the 22nd of April, 1875, when the Act of 1875, repealing sect. 8 of the Act of 1874, took effect. She therefore says that the decisions in *Laing* v. *Reed* (Law Rep. 5 Ch. 4), and cases of that class, do not affect her; that she lent her money upon the faith of the Act of 1874, and must be entitled to prove as a creditor in respect of her loan as having been made with a parliamentary sanction in priority to any one not similarly interested. It becomes necessary, therefore, to closely

being *ultrà vires*, it follows that the securities given to the lender are void, and the deeds must be given up to the liquidator.

C. A. 1882

In re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.

examine those two Acts of Parliament. [His Honour then read the Building Societies Act, 1874, ss. 7, 8, 14, 15, and continued:] Now it is said on behalf of Mrs. *Hawkins*, that as her two loans of £1000 were made to the society after the 2nd of November, 1874, they were made under the borrowing powers conferred by the Act of 1874. It is said, first, that under sect. 15, rule 1, the society was authorized to receive loans within the limits provided by the next sub-section, viz., not exceeding two-thirds of the amount for the time being secured to the society by mortgages from its members; and it was urged on behalf of Mrs. *Hawkins* that as her money was lent while this Act was in force, and as the amount did not exceed the prescribed limit, though upon this point the evidence is not very clear, she is entitled to claim the amount of her advances as a loan made expressly in pursuance of this Act. The argument upon this branch of the case was very complicated, but in my judgment the claim as founded upon the Act, in whatever way it is put forward, is wholly untenable, by reason of the fact that the 5th sub-section of the 15th section had not been complied with. That sub-section is as follows: "Every deposit book or acknowledgment or security of any kind given for a deposit or loan by a society, shall have printed or written therein or thereon the whole of the 14th and 15th sections of the present Act." It was admitted that this sub-section had not been complied with; and I hold that it was of the very essence of the securities alleged to have been given under the powers conferred by this Act that the Act itself should be strictly and even literally complied with. But it was not. It was admitted that the 5th sub-section had been wholly disregarded; that no deposit book had been given; that no deposit book or acknowledgment or security given for a deposit or loan to the society had printed thereon the prescribed sections of the Act, and that in fact there had been no compliance with this sub-section, in fact that the loan was made wholly without reference to the Act or its provisions. The whole argument therefore under the Act falls to the ground; and in my judgment the claim of Mrs. *Hawkins* cannot be supported as a loan contracted under the authority of this Act.

Then comes the Act of 1875, which as from the 22nd of April, 1875, repeals the 8th section of the Act of 1874, and thereby repeals the borrowing powers of any society deemed to be a society under the Act of 1874, but it is provided that the repeal shall not affect anything done or suffered in pursuance of the Act of 1874. It is argued that the loans by Mrs. *Hawkins* were things done in pursuance of the section and suffered to remain in pursuance thereof. But inasmuch as I hold that the loans were not effectively done under the Act of 1874, I do not see that the saving clause of the Act of 1875 has any effect upon the question.

On the whole I come to the conclusion that Mrs. *Hawkins* cannot support the loan in any way under the Act of 1875. Her claim therefore rests upon the broad grounds I have already referred to in *Crace-Calvert's Case*, in so far as such claim rests upon loans made without any deposit of deeds to secure them.

The result of my decision may be

C. A.
1882
In re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.

The case is entirely covered by *Blackburn Building Society* v. *Cunliffe* (1).

[They were stopped by the Court.]

---

shortly stated thus: A building society is not a company in the usual or ordinary sense of the term; it is not and ought not to be a borrowing society except within particular limits and for particular purposes. If such a society, either without any borrowing powers or with an unlimited borrowing power, accepts loans from lenders, those lenders are not, in the ordinary sense of the term, creditors of the society, and would not be entitled to an order for winding up the society or to relief consequent thereon; but where the society is wound up without any reference to such persons, and when all outside creditors have been paid in full, and all costs of the liquidation have been provided for, and the ultimate distribution of the remaining assets has to be made, the persons who (as in these cases), at the solicitation of the society, through its trustees, have lent their money to the trustees of the society for the benefit of the society are entitled in the ultimate adjustment of the affairs of the society to be repaid so much of the loans as can be met out of the assets of the society, and the members of the society are not entitled to say that such assets belong to them, because the loans were illegally made. Then, further, such persons, as between themselves, must divide the assets according to their rights as secured or unsecured claimants upon the assets. Those who have deposits of deeds giving them a special charge upon the property comprised in the deeds deposited with them will have priority of payment to the extent of their securities, and will be entitled to be paid to the full extent of their securities in priority to non-secured claimants, and will be entitled to prove against the assets in respect of the balance (if any) of their claims; and claimants who have no special deposit or security will then be entitled to be paid their respective claims rateably out of the general assets of the society remaining after payment of (1) Outside creditors, (2) Costs, (3) Secured claims.

In the result I hold as to Mrs. *Crace-Calvert*, that she is entitled to have the securities held by her by way of deposit realized, and to have the proceeds thereof paid to her in discharge *pro tanto* or in full of her claim, interest, and costs; and to prove in the liquidation for the balance, if any, due to her.

As to Mrs. *Hawkins*, that she is entitled to prove merely for the loans made by her, and for interest and costs.

I would lastly observe that my judgment in these cases does not, in my view, at all militate against my recent decision in *Blackburn Building Society* v. *Cunliffe* (22 Ch. D. 61). The case was one of bankers who, in my judgment, dealt with the trustees of that society with full knowledge of the facts of the case, and with express notice of the rules of the society, and who claimed to enforce—not a definite charge for a given sum advanced, but an indefinite claim for advances from time to time made by them upon a security given to them by the trustees of the society, which, in my judgment, was wholly illegal and void.

---

(1) 22 Ch. D. 61.

Rigby, Q.C., and *Hopkinson*, for Mrs. *Crace-Calvert*:—

Although the borrowing did not create the regular relation of lender and borrower between Mrs. *Crace-Calvert* and the company, yet as between her and the members of the company who invited the loans and received the benefit of the money and had participated in the illegal act, important equities arise. The outside liabilities are only about £229, and will be easily provided for. The question now arises how the residuum is to be divided. The money advanced by persons in the position of Mrs. *Crace-Calvert* cannot be altogether traced, but it has been used for carrying on the business, and it is unjust that the shareholders who have had the benefit of the loans should divide the assets in priority to those who advanced the money. This applies to the unadvanced shareholders whose claims amount to more than £7400, and who claim to be paid in priority to us: *Wilson's Case* (1). The borrowing was *ultrà vires*, it was not illegal in the strict sense of the word; therefore there can be an equitable liability on those who borrowed it although we have no legal remedy. The doctrine laid down in *Barwick* v. *English Joint Stock Bank* (2) is not applicable: *Chapleo* v. *Brunswick Permanent Building Society* (3); *Coltman* v. *Coltman* (4). It is similar to the case of money paid by mistake; the person who paid it is entitled to recover it. It is a principle of the civil law which has been adopted into our law that no one can enrich himself at the expense of another.

There is a special ground on which Mrs. *Crace-Calvert's* loan may be supported. The *Building Societies Act*, 1874 (37 & 38 Vict. c. 42), enacted by sect. 15 that any deposits with or loans to a society under that Act, which by sect. 8 included all building societies certified under 6 & 7 Will. 4, c. 32, made before the commencement of the Act in accordance with its certified rules, were declared to be valid. That Act came into operation on the 2nd of November, 1874. Then the *Building Societies Act*, 1875 (38 & 39 Vict. c. 9) repealed sect. 8 of the Act of 1874, thereby excluding this building society from the operation of the Act of 1874,

(1) Law Rep. 12 Eq. 516.
(2) Ibid. 2 Ex. 259.
(3) 6 Q. B. D. 696.
(4) 19 Ch. D. 64.

C. A. 1882 — *In re* GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.

but enacted that such repeal should not affect anything suffered or done in pursuance of such section before the date of the passing of the repealing Act, that is before the 22nd of April, 1875. So that between the 2nd of November, 1874, and the 22nd of April, 1875, Mrs. *Crace-Calvert* had a debt and securities capable of being enforced against the society. We contend that that right has not been taken away by the repealing Act of 1875.

S. Hall, for the unadvanced shareholders.

JESSEL, M.R.:—

This is an appeal from the decision of the Vice-Chancellor of the County Palatine Court of *Lancaster*. The question is, how the assets of the society are to be disposed of, having regard to the very curious circumstances of the case. This is a building society with a rule which empowered the governing body of the society to borrow unlimited sums of money. This rule has been certified and been acted upon to a very considerable extent. But it is now well settled by the law that in such a society as this an unlimited power to borrow is not authorized, and that consequently such borrowing is beyond the powers of the society. Still, all has been done here perfectly *bonâ fide*. The persons who made the rule, as well as those who acted upon it by borrowing and lending, all acted under a common mistake in law that that was a lawful rule, and was binding on the society. To a great extent the borrowing has been from the bankers of the society, and the money so borrowed has been advanced to members of the society on mortgage securities in the usual way, who thereby became advanced members. A sum of about £7000 has also been received from unadvanced members, and has been employed in making loans in the same way. The borrowing from the bankers went on for a long time, and the sums borrowed were from time to time paid off with money borrowed from other people, including the Respondent, Mrs. *Calvert*. In some cases the moneys advanced by these third parties were not applied in repayment to the bankers, but were lent to unadvanced members, and so these funds have got mixed up in a way which renders it

difficult to say how far they have been applied in one way and how far in another. Under these circumstances, the society was wound up, and it appears that of the amount paid up, amounting to upwards of £81,000, £7000 odd has been obtained from the unadvanced members of the society, and the balance of the sum in question had been obtained in some shape or other from people who lent their money either without security or on equitable deposits or mortgages of property to the society, and the present Respondent is one of those persons. Such borrowing from her was unauthorized, and consequently her loan to the society did not create either a legal or equitable debt from the society to her, it being beyond the power of the society to incur any such debt. It follows, therefore, that the deposit or security which she obtained was a deposit or security for nothing; it was a deposit or security not authorized, and the result is, therefore, that she must give it up. Upon that point there can be no doubt whatever. But then what is to be done with the assets of the society? It is obvious that if the society realizes £81,000 worth of its securities, there will be about £70,000 odd of claims made which have arisen from the advances made by the persons who lent the society their money under the illegal rule. The actual figures will of course be considerably smaller, because the £81,000 will not realize so much by a very large sum. Still, after paying the strictly outside creditors and the sum subscribed by the unadvanced members, there will be a very large surplus to be disposed of. It is plain that it cannot be said on behalf of the society that the surplus so obtained ought to be retained by the members of the society. It was obtained by their own innocent mistake, because they had passed the rule authorizing the directors to borrow. They advertised for loans, and so obtained the money. It was a mistake common to both sides. The surplus which arises from the advances so made must obviously on the plainest principles of equity be returned to the people who advanced. Nobody can have a claim upon it except those whose money it is. The actual money cannot be traced, but after the prior claims on the assets of the company have all been paid off the surplus must come to them, but with regard to the intermediate application of the surplus it must go to the outside creditors and the unadvanced

C. A.
1882
In re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.
Jessel, M.R.

members who have established a claim. The outside creditors had nothing to do with the adoption of the mistaken rule, they were not bound in any way, and they are therefore entitled to come upon the society and say that the assets were liable to satisfy their demands. Of the unadvanced members there are two classes, those who had given notice of withdrawal and those who had not; but for the purpose of the present judgment it is unnecessary to distinguish between them in order to determine their priorities. It cannot be said that the unadvanced members of the society are not to take the assets. They have a right to claim payment out of the assets, and it is impossible to point to any part of those assets as coming from any particular part of the money as distinguished from the rest. Their legal rights must therefore prevail, and they will accordingly be paid in priority to the other persons who would get the surplus. Of course, the costs of the liquidation must be paid in priority to every other claim. The proper decree to make will be to discharge the order of the Vice-Chancellor, to order payment of the liquidator's costs, then those of the Respondents; next, payment of the outside creditors, then of the ordinary unadvanced members, and then distribute the surplus *pro ratâ* among the persons who had advanced their money by way of loan upon those invalid contracts. The deeds must, of course, be ordered to be delivered up to the official liquidator.

COTTON and BOWEN, L.JJ., concurred.

HAWKINS' CASE.

Mrs. *Hawkins* appealed from the Vice-Chancellor's decision.

Chadwyck Healey, for the Appellant:—

Mrs. *Hawkins* made her advance and received the promissory notes of the trustees in the interval between the 2nd of November, 1874, when the Act of 1874 came into operation, and the 22nd of April, 1875, when the Act of 1875 repealing the 8th section of the former Act was passed. Therefore she advanced the money at the time when the society had full power to borrow the money. The only ground on which the Vice-Chancellor refused her the

benefit of her security was that the 14th and 15th sections of the Act were not printed at the back of the promissory notes as required within the 5th sub-section of the 15th section. But this enactment is merely directory, and cannot affect the validity of the security.

Ambrose, Q.C., and *Maberly* (*Edwin Jones*, with them), for the official liquidator.

JESSEL, M.R.:—

We are all of opinion that the sub-section referred to is only directory. The promissory notes held by Mrs. *Hawkins* are valid, and she will be in the same position as the outside creditors, and will have her costs.

SCOTT'S CASE.

Mr. *R. W. A. Scott* was the holder of five £30 deposit or preference shares, which he obtained in August, 1874, and of five others which he obtained on the 16th of April, 1875, and of 300 £1 shares, which he obtained in 1878. His £30 shares had been exchanged for 300 other £1 shares. He had received payment of £50, and had given notice to withdraw the remainder.

Josiah Whittle was the holder of 973 preference £1 shares, which he had given notice to withdraw.

John Scott was the holder of 300 £1 preference shares, some of which had been issued as £30 shares in the latter part of 1875, and the remainder as £1 shares after the alteration of the rule. He had not given notice of withdrawal.

These applicants claimed to rank as creditors of the society in respect of the sum paid for their shares, and to be paid in priority to all other shareholders.

The Vice-Chancellor held that the 31st section was invalid, that the applicants were not members, but were entitled to prove against the residuary assets of the society *pari passu* with those who had advanced money to the society (1).

(1) 1882. June 12. Mr. H. F. BRISTOWE, V.C.:—

The real point here seems to me to turn upon whether in truth these persons, *R. W. A. Scott*, *J. Whittle*, and *J. Scott*, are members of this society,

C. A.

1882

In re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.

From this judgment the Applicants appealed.

Cozens-Hardy, Q.C., and *H. B. Buckley*, for the Appellants:—

We are shareholders under the 31st section of the rules, and stand in the same position as the unadvanced shareholders. The

---

or whether they must be treated as in the nature of creditors—not strictly creditors, for I cannot treat rule 32 as of any validity—but having to deal with the question upon the final winding-up of the whole society, and having to deal with the residue of the assets in that which is the equitable mode of dealing with them, I treat these persons as claiming to be creditors or claiming to be members, and the question is really which of the two positions do they fill. In the first place I desire to say that, with regard to Mr. *Buckley's* argument as to what I have called the gap period between the different Acts, I do not think it necessary to add anything to what I have said in the former case of Mrs. *Hawkins*. I adhere to that decision, and I do not think that the supposed analogy between the *Companies Act* and this Act makes much difference on this point. I think there was no sufficient loan under the intermediate section to constitute a loan under the first Act at all, and therefore that particular part of the argument I treat as being already disposed of in the former cases.

Then comes the second and very important point, namely, what is the effect of the certifying barrister having excluded and having refused to certify as a valid thing the 31st section? It came before him and appears to have been struck out by him, but singularly enough the parties, disregarding that, continued to print it in their books. Now with reference to the power of the certifying barrister, I think that it must be admitted, after *Laing* v. *Reed* (Law Rep. 5 Ch. 4), that his decision as to certifying a clause to be a good clause, if it be contrary to the law of the land, cannot make a bad clause into a good one. But I do not myself see that the converse argument is quite of the same force, namely, that when he has taken into consideration a particular clause, and has in the exercise of his discretion struck out that clause as being improper, you can still say that his certificate is something that does not matter, and that it is inoperative to strike out that which he had intended to strike out. I think that when he has struck out a clause it must be treated, at all events for a great number of purposes, as really binding upon all parties that can be bound by it, that the clause should be excluded. But I prefer to take the case as if that clause had really and properly formed part of the book of rules.

Now Mr. *Buckley* and Mr. *Hopkinson* have both put it that it was a matter of immateriality whether sect. 31 did or did not exist, and that in fact under sects. 5 and 37, either taken separately or taken together, you would have a sufficient membership to shew that these persons who lent their money—for I only call it that—who made a deposit of certain money and got their paid-up shares, would have been in the same position under sects. 5 and 37 as if sect. 31 had not existed. That I think is an argument that will not hold good. I think it is perfectly clear that sect. 5 and the section which is co-relative to it, sect. 37, does not

only difference is that we advanced our money all at once, and they made their payments by instalments. Whatever may have

contemplate anything but a member holding shares, which shares are to be of a particular definite sum and value; and that those shares held by those members were to be calculated for the purposes of ultimate repayment according to a fixed scale of interest.

Now when you turn to Table No. 2 it is clear that that is a computation on a 5 per cent. compound interest table, which is the right of the member under sect. 5, and is not only his right, but if he were under Table No. 1 (and he might hold shares under both) he might under Table No. 1 have to pay certain fines for non-payment of his ordinary subscriptions monthly, which go to the benefit of Table No. 2 to make up the compound interest at 5 per cent. But when you come to the 31st section you find that the person making the deposit is entitled to a fixed interest at 5 per cent. per annum, which is never to be more than 5 per cent., and under which he could not properly be entitled to take the compound interest which is given by Table No. 2. In other words, if a person making a deposit had allowed his interest to accumulate, it does not seem to me that he could have possibly made a claim for more than ordinary 5 per cent. interest, whereas a person making a payment of the £60 or £120 would necessarily get the accumulated interest given by Table No. 2. That mode of paying interest is sufficient, to my mind, to shew that it could not have been intended that rule 5 was to apply to such a case, and that rule 31 was intended by the parties themselves as the governing rule.

Then comes a very important section, namely, sect. 41, and it appears to me clear that if the parties had all they wanted under sect. 41 the withdrawal clause under sect. 31 was absolutely nugatory. But more than that, sect. 41 puts a limit to the withdrawal, and therefore shews that those persons who were members in the ordinary proper sense of the term fell under rule 41, and the depositors fall under rule 31. Without going therefore into all the debated differences of the two sets of clauses I think it cannot be held that these applicants can in any sense be properly treated as members.

Then it is not unimportant to refer to the statement in the agreed statement of facts, namely, that the applicants were not entered in the list of members of the society, and that no bonuses or profits were ever credited to them, and that they did not vote at any of the meetings of the society; and further, that interest on the deposits was paid out to them half-yearly and was not accumulated until withdrawal as in the case of the subscribing members. Then we also find the extraordinary proviso about the levy inserted at the end of sect. 37.

Then it is said that these persons did in fact become members because the balance sheets and reports of the society shewing the amounts which they had paid and stating what levies were required were sent to them; but that, in my judgment, is wholly insufficient to enable me to hold them to be members in the same sense as unadvanced shareholders, and the only conclusion I can arrive at is that they were people who lent money to the society and who got by virtue of these loans these documents which

C. A. 1882 *In re* GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.

been the effect of the 31st section being struck out by the certifying barrister, it has now been made valid by his certifying the alteration in it made in 1876. All the old £30 shares were exchanged for £1 shares after that date, and cannot now be questioned.

Ambrose, Q.C., and *Maberly* (*Edwin Jones* with them), for the official liquidator:—

The Appellants are not shareholders, they are simply creditors who advanced money, like Mrs. *Crace-Calvert*, on the faith of a rule which is invalid; and they ought to stand in the same position as she does. The fact of the barrister certifying the alteration did not set up the rule which he had refused to certify; it was merely nugatory. But if it had the effect of certifying the original rule, it is not conclusive as to its legality: *Laing* v. *Reed* (1). Such a rule is contrary to the scope and objects of building societies, which is stated in the preamble of 6 & 7 Will. 4, c. 32, to be for purchasing and erecting dwelling-houses by means of small periodical subscriptions. This rule is a scheme for

---

are called deposit certificates or deposit receipts.

But it was argued by Mr. *Buckley* that if the certificates are bad they may be thrown over and you may go back to what was really the contract between the parties. But I am afraid I cannot treat it in that way, I cannot hold that these persons can throw over the certificates and treat them as of no force against them and then rely on other general words so as to exhibit a right other than what the certificate gives them. The certificate shews the contract and makes them in fact lenders of money on the certificates.

Then comes the question whether, as regards Mrs. *Crace-Calvert* and persons in her position, these applicants were entitled to claim against the assets of the society on the same footing as other non-secured persons and persons who are proving for the part of their debt not covered by their security. In my opinion that is so. When we come to deal with the question upon which I have to arrive at a conclusion, namely, how the ultimate fund is to be distributed, I cannot see how the persons who may be called deposit certificate holders differ in any sense from other persons who have obtained as pledges the securities of the society and who have a claim against the society for more than the value of the pledges. Therefore I hold these applicants not to be members; and I hold them to be entitled to prove against the assets of the society *pari passu* with persons who either had no security, or who, like Mrs. *Crace-Calvert*, claim a security and seek to prove for the balance.

(1) Law Rep. 5 Ch. 4.

unlimited borrowing; it transforms the society into a banking company. These deposit holders, though called preference shareholders, are not shareholders in the ordinary sense of the word. They can draw their money at any time; they cannot obtain advances on their shares as other shareholders can; they do not share in the losses of the society, nor are they liable to any levy under sect. 37. Preference shares were never contemplated by the Act of Will. 4.

JESSEL, M.R.:—

This case raises important questions, which I believe have never been raised before. The rules of the society are most peculiar. The question to be decided is as to the right of certain persons, called members of the society, who took what was called paid-up shares. As to part of them, they originally took £30 shares under one of the rules, and afterwards exchanged those shares for £1 shares. Half of the members, it is said, are in that position, the other half being subscribers for £1 shares. The first point to be observed is that, whatever the effect of the Act of Will. 4 may be, it applies to societies already in existence, and it professes to deal with those societies. It is familiar to all who are interested in the subject that at the time of the Act these societies consisted of two classes of members, investing members and borrowing members, sometimes called advanced and unadvanced. The scheme of those societies was this: There were certain persons who had saved or were saving money and were desirous of investing it at a higher rate of interest than the usury laws enabled them to obtain at the time; and other persons who were desirous of either building or buying houses for their own habitation. Those two classes of persons came together; the people who had saved money or were saving money paid it into the society, and it was lent to persons who were desirous of building or buying houses on the security of the houses, and on terms which compelled the borrowers to pay a larger sum by way of interest than 5 per cent. per annum. That this was the substance of those societies must have been known to the Legislature. The societies were divided into two classes, those which were called terminable and which came to an end at the expiration of a fixed period, sometimes of

C. A.
1882
In re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.
Jessel, M.R.

ten years and sometimes of fifteen, and the other class, called permanent societies, which came to an end when the shares were all paid up. In both cases at the termination of the society the profits were realised and the surplus assets were divided amongst the members who had paid up their shares. They got back their money with an addition in the shape of interest, which, though always expected to be more than 5 per cent., was sometimes a good deal less. Therefore, the investing members got back their money and interest, and the advanced members got their houses on payment off of the mortgages which were given to secure the sums payable on their shares.

Under those circumstances the 6 & 7 Will. 4, c. 32, for the regulation of building societies was passed, and it recited that certain societies, commonly called building societies, had been established in different parts of the kingdom, principally amongst the industrial classes, for the purpose of raising by small periodical subscriptions money to assist some of the members in obtaining small freehold or leasehold properties. That was only one of the objects of the societies. It must have been well known to the Legislature that the other object was that the investing members should get a high rate of interest for their money, and that it was known is obvious from another section. It was the object to assist, therefore, some of the members to obtain freehold or leasehold property, and some a high rate of interest. Then the Act enacted that it might be lawful for those two classes to form themselves into societies for the purpose of raising by monthly or other subscriptions of the members of such societies shares not exceeding the value of £150 each, and such subscriptions were not to exceed 20*s.* a month for each share. These words obviously refer to such subscriptions as were to be paid monthly, and do not prohibit other contributions. Such subscriptions were to form a stock or fund for the purpose of enabling each member of the society to receive out of the funds of the society the amount or value of their shares therein, and to erect dwelling-houses, or purchase real or leasehold estate to be secured by way of mortgage to the society until the amount of their shares should have been fully repaid to the society together with interest thereon. There is no provision here as to investing members.

It looks as if everybody was to get an advance, and that the framers of the Act were forgetting that the people who made the advance must be somewhere. Then the Act goes on, "And to and for the several members of each society from time to time to assemble together, and to make, ordain, and constitute such proper and wholesome rules and regulations for the government and guidance of the same as to the major part of the members of such society so assembled together shall seem meet, so as such rules shall not be repugnant to the express provisions of this Act, and to the general laws of the realm." Whether those rules were intended to be merely by-laws to be made after the society was constituted or not does not appear to me to make any difference, because the Legislature must have known that the society could not start without rules, and therefore, if you restrict those words to the subsequent rules or laws, there is no provision as to the original rules, and it appears to me that this is the true meaning of the clause; that the rules spoken of are not the original constitution of the society, but subsequent "as to the major part of the members of such society so assembled together shall seem meet;" but they must be members to make the rules. It seems to me to point to a period subsequent to the starting of the society, and that there is really in this very Act of Parliament no restriction, and no direction as to the original rules which govern the constitution of the society. But, however, whichever view you take, the only limitation as to the rules is this: that they shall not be repugnant to the law of the realm, or to the express provisions of this Act. Then the 2nd section of the Act clearly shews me this, that the Legislature clearly had the investing member in view, for it provided that it might be lawful for any such society to receive from any member thereof any sums of money by way of bonus on any shares, for the privilege of receiving the same in advance prior to the same being realised, and also any interest for the shares so received, without being subject or liable on account thereof to any of the forfeitures or penalties imposed by any of the Usury Acts; or, in other words, the society was entitled to take from the borrowing members a larger rate of interest than the usury laws allowed. Those words can have no possible meaning unless they contemplated a body of lending

C. A. 1882

In re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.

Jessel, M.R.

members. By lending members, I do not mean lending in the actual sense of a loan proceeding from the members, but that class which I have described as investing members. Then the 7th section extended the benefit of the Act to all societies then existing which got their rules certified. Although it has been held that a general unlimited power of borrowing is contrary to the constitution of such a society, I am not aware of any decision which would prevent the society from having paid-up shares, preference shares, or any other class of shares, and it is undoubtedly the case that in many societies there are various classes of shareholders, though perhaps not varied as in this one.

The first question the Court has to decide depends upon a very peculiar state of circumstances. This society had its rules printed, and when they were sent to the revising barrister he struck out rule 31, but notwithstanding that it was struck out, the society continued to insert the rule in their printed books as if it were still in force, and took thousands of pounds from the public on the representation that it was a rule of the society. I do not intend to impute to the directors any notion of fraud. I think they were simply guilty of gross carelessness; but it is an extraordinary circumstance that the directors and trustees of the society should have continued printing the disallowed rule and have taken the money of the public on the assumption that it was still in force. The rule gave the public the option of taking £30 shares, and many persons were induced to take shares under it. What is the position of persons who have paid their money for such shares, and whose money went into the coffers of the society? It is tolerably plain that, as between them and the society, the society on winding-up must either admit the validity of their shares, or give them back their money. The society cannot say to them: "We represented to you that there was a rule which entitled us to issue such shares, and we got your money by that representation, but as the rule was not certified we are not liable to you in any way." At a subsequent period, having forgotten that this rule had been struck out, they amended it. In June, 1876, they amended a non-existing rule by inserting "£1" instead of "£30." The amended rule went to the revising barrister, and I am afraid

I cannot acquit him of being a little careless also, for he passed the amendment without satisfying himself as to the existence of the rule. The effect of his certificate was to make the rule which had been struck out a valid rule again, so that after the 19th of June, 1876, this rule existed, but altered by substituting £1 for £30. Then those members who had subscribed for £30 shares exchanged them for £1 shares, and others who had not before held paid-up shares took up shares of the new issue. The amount subscribed was about equally divided between the two classes of subscribers. The question is, whether either or both in the winding-up have any claim upon the society. If I am right in the view I take of the position of the subscribers of the £30 shares, they cannot have lost their right by taking £1 shares. And with regard to those who took up shares of the new issue there was no misrepresentation at all, and if the rule is valid they are entitled to the £1 shares, and if it is invalid then the question arises whether the transaction was in fact a contract to take shares, or whether, as the Vice-Chancellor has held, it was a mere device for a loan, and therefore struck at by the decisions which laid down that a society could not have an unlimited power of borrowing money.

Was this a device to borrow? That is always a question of construction. It must depend on two things: First, you look at the articles to see whether it was a disguised borrowing—for that is the meaning of a device to borrow; secondly, one has to consider whether even supposing it was not intended to be a disguised borrowing, it was not so in fact? I have come to the conclusion not only that it was not intended to be a disguised borrowing, but that it was not so in fact. As regards the intention, I never saw a clearer case, for the rules contain an express power to borrow and to an unlimited amount, so that there is no occasion for having recourse to a device. The people who framed the rules no doubt were mistaken in law according to the decisions, as they thought they might borrow to any extent they liked, and put it in the plainest terms; therefore it is impossible, as it seems to me, to suppose for a moment that they thought rule 31 to be otherwise than a *bonâ fide* rule. Rule 32 enables the society to borrow and take any sum of money from the

C. A.
1882
In re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.
Jessel, M.R.

bankers of the society, or from any bankers, or from any other person, and the borrowed money must be a first charge on the funds of the society. This puts an end to any notion of an intention to disguise the power of borrowing, but still it does not put an end to the question whether it is in fact a mere borrowing under the disguise of issuing shares, although not so intended; but the fact of the intention being plain of course is not to be lost sight of in ascertaining what the meaning of rule 31 is. When you shew that it is not intended to be a borrowing, but it is intended to be an issue of shares, it does help you to determine whether what is issued is a share or not. Is it a share? First of all it is called a share. "The board for the time being shall have power, as circumstances may require, to issue deposit or paid-up shares of the value of £30, upon a certificate bearing interest, after the rate of 5 per cent. per annum, and such certificate shall entitle the depositor"—it does not entitle him to interest; that is the important point, it shall entitle him—"(after one month's notice in writing, to be reckoned from a monthly meeting) to withdraw the whole or part of his deposit in preference to all other shares." Now it is to be observed upon those words: first, there is no agreement to pay him anything. The certificate only entitles him to withdrawal; it is not an absolute right, but only in preference to other shares. It is behind the lenders; that is the important point. It shews it is not a mere borrowing of money, because if it were they would be on the same footing as the other lenders; but the other lenders are to have a first charge on the property of the society, whereas these people only take a preference as between themselves and the other shareholders. Now I must call attention to the 5th section of the same rules. There the society is to consist of holders of shares and half shares, and it will be found that "members may pay up in advance any number of shares or half shares in accordance with Table No. 2," so that even the ordinary members may pay up in advance. How do they differ from the paid-up shares? They differ in this way: they are behind them. The withdrawing member who has got a paid-up share under sect. 31 is entitled in preference to all other shares; but still the man who pays up his share under sect. 5 is a paid-up shareholder, and on

C. A.
1882
In re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.
Jessel, M.R.

withdrawal will get his money paid if there is money to pay him, but he is in an inferior position, for these are, if I may call them so, preference shares. Now when we come to the power to withdraw there is no other power to be found except sect. 41. It is headed "Power to withdraw," and though the first part of the section relates to unadvanced shares, which in a sense these deposit shares are, it relates really to advanced shares, which the deposit shares are not, because the amount payable is to be determined by the tables, which do not apply to them. Therefore the first part relates to advanced shares under sect. 5, whether they are paid up or not. Then there is to be one clear month's notice, the same notice in both cases as regards time, the only difference is this: one is a month's notice after a monthly meeting, and the other is a clear month's notice. Then "withdrawals shall be payable in rotation according to the priority of notice;" that seems to be general and must be applicable to all withdrawals. "The board may limit the number of withdrawals to be paid off in any one month." That is really the criterion of the whole thing (if they are shares and you can only get paid on withdrawal), and of course it was never intended that you should break up the society by selling up its property. What was meant was this (which is very often provided for—indeed, I have seen it provided for in a great many rules)—that you shall only be allowed to withdraw the money when there is money to withdraw; and that is the meaning of these words, that "The board may limit the number of withdrawals to be paid off in any one month." Now, if this is the true meaning of it, these preference shareholders, as I have called them, can only withdraw if there is money to pay them. That is a totally different position from a lender. The lender of money, when the time for repayment has arrived, whether that time of repayment was originally fixed or whether it is fixed by his own volition, has a right to immediate payment (he has a right to judgment and execution); but these people have no such right. As I read the rules they have only a right to be paid when the board shall so determine. Of course the board will only so determine having regard to the funds they have at their disposal available for the purpose of repayment. It appears to me the holders of deposit shares are not lenders at all, that they are

C. A. 1882 *In re* GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY. Jessel, M.R.

shareholders, and like the other shareholders entitled to withdraw if they wish to do so. The other shareholders who are unadvanced may withdraw at any time whether paid up or not; therefore, in this respect, the position of preferred shareholders does not differ from the position of non-preferred or ordinary shareholders who are unadvanced; that is the point, that they are not in the position of lenders. On the other hand, what is the position of the society? A borrower may always pay off a loan; indeed, it has been carried so far that he may pay off a loan before it is due. He may be liable to pay damages; that is, to pay interest over and above, to compensate the lender for paying off before it is due, but he can always pay it; whereas this society cannot pay off the preference shares, there is no power until the end of the society to pay them off at all. The effect of this is that the withdrawing member will only get his money, and a member who does not withdraw will get nothing till the end of the society. If that is so, the society is no more in the position of borrower than the deposit shareholder is in the position of lender. It is, in fact, a true preference share; that is, it gives them rights subject to the payment of the society's debts—of course I mean those debts of the society which are valid.

That being so, if they are true preference shares, is there anything in the Act of Parliament which prevents their being valid as such? Of course you must find something either in the common law or in the express words of the statute to prevent that. I cannot find anything in the common law—it is out of the question; and there is nothing in the statute which says that you may not contract to give some shares an advantage over others for value received. But then there is this further consideration which must be discussed. Is it contrary to the nature of these societies so that it is impossible to make a society with this kind of share consistent with the law and conduct of the society? On that point I do not think it is the province of the judicature to find out things to be inconsistent with the ordinary requirements of mankind, which the people themselves have not found out. It is all very easy for people to say it is against policy, or against the meaning of these societies; but when you see that people who

C. A.
1882
In re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.
Jessel, M.R.

have established the society do not think so, and have acted on a contrary view, it is very improbable that it is contrary to the nature of the society, and contrary to the objects the members have in view. But besides that I cannot see any reason why it should be so. The lending members are unadvanced members. The investing members become so for the purpose of getting more interest than they can get in the usual way. Why may they not stipulate for some security? Why may they not say as between themselves and the other members, If this society comes to grief, recollect we shall be paid first. It is only in that case? "If this society is prosperous everybody is paid, and paid handsomely." Why shall they not say, "We will put our money down; we will start your society, and get you money which shall be advanced to your building members or buying members who want house property on these terms, viz., if we put our money down in hard cash, if the society does not turn out prosperously we shall be repaid?" There does not appear to me to be anything against the constitution of the society in such an arrangement; on the contrary, it may enable societies to be established which otherwise could not be set agoing at all. Again, is it contrary to the constitution of such a society that members shall pay up instalments in advance? I say clearly not. The more money you get from the investing members the more money you have ready to advance to the borrowing members, and the more rapidly you would bring your society to an end, if the society is established without a fixed period. It seems to me there is no reason why the judicature should say that these arrangements, which as far as I am concerned appear to be perfectly reasonable, and not only framed not to obstruct, but to further the object of these societies, are illegal because they are contrary to the policy on which these societies are founded. It does appear to me that there is no valid legal objection to what has been done, and I hold that the second class (those who came in and took the £1 shares) are entitled to the benefit of their shares, and therefore, subject to the payment of the debts, are entitled to be paid out of the assets of the company. Of course this covers the claims of the first class, which I should have been ready to hold, in the event of our not being willing to

C. A. 1882

In re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.

extend the benefit to the second class, entitled to come in subject to the payment of the outside creditors.

COTTON, L.J.:—

The question we have to decide on this appeal is, whether the holders of certain shares, whose money has been taken by the society without any authority, are entitled only (as decided by the Vice-Chancellor) to come in and receive back what they can get after all the creditors and shareholders have been paid, in which case they will not receive the full benefit of their moneys, which have been taken illegally; or whether they are entitled to stand as holders of shares, and as such to be paid in accordance with the rules of the society. Now the rule, under which these shares must be considered as taken, authorized paid-up shares to be issued, and the terms on which those shares are to be issued are stated in the printed section (31), subject only to the substitution of £1 for £30. Some question has been raised as to whether it can be said there is any such rule. I do not say for a moment that those holders would stand in a worse position if there were no such rule; but I think the effect of what has been done is this, that a print being submitted to the barrister, and sect. 31 being struck out by him, it ought not to have been in the print of the rules of the society; but the effect of what the barrister did afterwards was to replace sect. 31 in the print, with the substitution of £1 for £30 as a new rule of the society, and the question we have to consider is, whether the holders of shares under that rule are entitled in the winding-up to be treated on the footing of being shareholders. It was argued that this rule was illegal, and therefore that they could not be so entitled, and it was so decided by the Judge in the Court below. The Vice-Chancellor said: "By illegal of course is meant not that which is prohibited under penalty, but something which is not allowed in societies of this nature." I do not say for a moment that the rule as it originally stood would have been a rule which could properly be introduced into a society of this sort, because it provided for payment at once of £30 down, whereas the Act says that the subscriptions are to be periodical, and of small amounts, that is, not to exceed £1 monthly. The barrister might very well

have said: "This is not a rule which is in accordance with the constitution of this society, which primarily is a society which raises funds by subscriptions small in amount, not to exceed £1 in a month." But we must consider whether, with the alteration referred to, it is contrary to law that a society of this sort should have shares of this description. Now, I do not at all express an opinion that if a society was formed with nothing but shares such as these, it would come within and be such a society as is entitled to the benefit of the Act of 6 & 7 Will. 4, and of the *Friendly Societies Act*, which was introduced by that Act into building societies; because under those Acts the society must be one which does, to a considerable extent at least, consist of members who, by small subscriptions from time to time, are to provide a fund to be dealt with by the society; but here we have this fact, that this is a society which was formed, to a very great extent at least, for the purpose of receiving subscriptions in the ordinary way from its subscribing members, whether they chose to take an advance or not. Then we have to consider whether in a society entitled, as regards its general constitution, to the benefit of this Act, this rule is *ultrà vires*, or that which the law will not allow as a binding rule and regulation of such a society. Now there is nothing whatever in this Act of Parliament which expressly prohibits such shares as these. The subscription to be paid at once, under the rule as amended, is not beyond the amount which is authorized, and, unless there is something else which can make this class of shares not admissible in such a society, we ought to hold that those persons who have been accepted in this way as shareholders are to be treated not otherwise than as entitled to be holders of valid shares. It is said that the fund is to be raised by periodical subscriptions; but it is not suggested that where a society has, by its constitution, the power to raise funds in that way, it is illegal to receive the total amount of the shares in advance. I do not think it necessary to go into the question whether under these rules the holders of these shares could have obtained an advance. I do not at all say that they could. I think under these rules the advance pointed at is an advance to be within the amount of the shares, and all the payments are calculated on that footing; but that

C. A. 1882 *In re* GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY. Cotton, L.J.

does not decide the question. If these are really shares not expressly prohibited by the Act of Parliament, why are we to say that these shares do not form part of the share capital of the society? The object of the society is this, that by means of the monthly or other subscriptions of the members a stock or fund may be raised for the purpose of enabling the members thereof to receive out of the funds of the society a certain amount—the amount or value of their share or shares. Of course it is clear that every member cannot become an advanced member. Some members must be members who either by choice or by want of luck do not get an advance. All members cannot be advanced. Those who have the luck to draw one will get it, and those who do not want it are not bound to take one, but the suggestion is that they must both be in the same position. It is clear there is nothing in the Act of Parliament that prevents shares of this sort. Powers of unlimited borrowing given to the directors have been rightly held to be *ultrà vires* and not within the purview of the Act. But there is no prohibition in the Act against the existence of a class of members who by choice, when they go in, may say once for all: "We do not require an advance." In my opinion, unless it can be said that this is really a borrowing, and is not taking in of members' capital, it cannot be said that the shares are *ultrà vires*. Of course if it appears in any particular society that this class of shares was introduced for the purpose of covertly borrowing—that is, giving under the mask of membership a power of borrowing—then it would come within the decisions and principle which lay down that such societies are not entitled to raise money in that way, because that would be doing something contrary to the Act of Parliament. Here did they so intend? I think the Master of the Rolls disposed of that by shewing that there was in the rules themselves an unlimited power of borrowing; and it may well be that that rule was introduced under the belief that it was perfectly legal. We can hardly come to the conclusion that this was introduced to do covertly, under the mask of something else, that which was openly authorized so far as rules could authorize it. The Master of the Rolls has shewn that these people stand, not in the position of lenders, but in the position of members who are entitled to withdraw their

money subject to the claims of creditors whose demands are payable in priority to theirs. A difficulty has been raised which must be taken into account, that in this society all unadvanced shares are to get interest on payments made. That appears by one of the tables; but it is unnecessary to decide that question now. It comes to this, that the directors have acted in accordance with the provisions of the Act, and therefore we ought not here to hold that this is borrowing under the guise of issuing shares. In my opinion, it cannot be said that the shareholders are to be put in any other position than that of shareholders. Then there is a difference as regards class. It seems that some took shares on the representation that there was a clause authorizing the issue of those £30 shares which the directors purported to issue. I think the Master of the Rolls intimated—and certainly I should hold to that view—that these persons have not lost any such right as they had by taking the £1 shares in exchange for the £30 shares, if the £30 shares were shares which could not be properly issued. Then could it be said that the society is entitled to retain the money received from those who took £30 shares which were taken by them on the representation of the agents of the society, from whom they took the shares, that there was a certified rule authorizing the issue of these shares, when in fact that was entirely inaccurate, and there was no rule authorizing the issue of any such shares? In my opinion, under those circumstances, the takers of those shares would be entitled to recover from the society that money which was obtained by the misrepresentation or by the carelessness or otherwise of those who were the agents, and who got that money from the persons taking the £30 shares. In my opinion, therefore, in the winding-up the holders of these £1 shares must be entitled to rank at least as high as the shareholders in this society.

BOWEN, L.J.:—

I am of the same opinion. After the judgments which have been delivered, in which I entirely agree, I do not propose to add very many words. It seems to me different considerations might very well apply to the two classes of persons with whom we are dealing. These are, in the first place, those who originally took

C. A.
1882
In re GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY.
Bowen, L.J.

£30 shares upon the representation virtually made to them by the company that sect. 31 had been certified by the barrister (whereas those who directed the society ought to have known, and must be taken to have known, that sect. 31 had been struck out), who therefore really were induced to pay their money upon a misrepresentation. How does their position differ from the position of persons who make loans to a society which has got no borrowing power? It seems to me the difference is tolerably clear. Those who deal with a society which professes to have power to borrow have equal means of knowledge with the society itself of the statutory powers of the company; they are put, so to speak, upon inquiry whether the company really can borrow validly or not, and if they choose to lend their money to a company which cannot properly borrow it cannot be said there is a failure of consideration. The company has got their money, it is true, but they must be taken to have known what they bought, and to have been willing to pay their money on the chance. But when you come to people who were induced, as these people were, to lend or to subscribe their money by misrepresentation put before them by the company—although the company has had the money I agree that the directors and not the company would be the persons to be sued for fraud, because the misrepresentation was I suppose the misrepresentation of the directors—the company cannot keep the money which they obtained by the misrepresentation of the directors without doing all that lies in their power to make good the representation. They cannot take the benefit of the misrepresentation and repudiate the act of the directors altogether. Therefore, in the first place, these people who subscribed money upon the faith of this sect. 31 being certified by the barrister would be entitled, as it seems to me, against the company, to be placed at all events in the position in which they would have been if sect. 31 had been approved by the barrister. It may be said that would not do them much good, because, if sect. 31 is invalid, they would only be placed in the position of people who had taken invalid shares. I think there would be a fallacy in that answer if it were made, because it does not follow that if the subscribers had known all the facts, if they had known from the beginning

that sect. 31 had not been certified by the barrister, they would have advanced this money. I take it they would be entitled to be placed in the position of creditors of the company but for their own subsequent acts. But they have been willing from the first, although creditors, to be treated as members; they subscribed upon the belief that they would be members, and when they took the £1 shares in 1876 they assented to stand on that footing. They cannot demand more of the liquidator than that they should be treated as members upon the terms of the rule, valid or invalid, and they cannot be denied as much as that. So that, if the case solely concerned the members who had taken shares on the faith that sect. 31 had been certified by the barrister, I should have no doubt that their claim was a good one, and I do not think they prejudiced it in the least by taking the £1 shares; that is to say, they are still entitled to assert their right to be treated upon the footing that those £1 shares are valid. But that does not dispose of the whole of the class which we have been discussing, because there is a large portion, half probably, who have taken £1 shares after 1876, and who have not therefore been induced by any misrepresentation of the company to subscribe, and therefore we are driven to consider the question whether the rule, as altered in 1876, is a valid rule, or *ultrà vires*. Now it certainly would be *ultrà vires* if the transaction were a disguised or real loan, but it seems to me, when you look at the rules under which the subscription is obtained, that it is not a loan. I will not go through what was said by the Master of the Rolls and Lord Justice *Cotton*, but simply state my opinion that it was not a loan. It really is intended to be a preferential share, which should place those people, to a certain extent at all events, in the position of investing members. It has been argued that the company had no right to create these preferential shares to the extent of £1. If the company had no right to create preferential shares of this kind to the extent of £1 it seems to me difficult to maintain that there could be such things as paid-up shares to the extent of £1. Whether shares created under sect. 31 to the extent of more than £1 are within the Act or not, it seems to me at all events

C. A. 1882 — *In re* GUARDIAN PERMANENT BENEFIT BUILDING SOCIETY. — Bowen, L.J.

that paid-up shares to the value of £1 and preferential shares of the value of £1 are. If you look at the words of the Act, however you read them, the limit is only this: there shall not be in any one month more paid upon a share than 20*s*. I say, however you read it, giving it the narrowest construction—the one most in favour of the contention of the liquidator—these are within it. For the other reasons given by the Master of the Rolls and Lord Justice *Cotton*, in which I concur, but especially for that reason, it seems to me that all the class are entitled to succeed who have the £1 shares, while those who originally subscribed for £30 have, it seems to me, an additional ground on which their claim rests.

Solicitors for Official Liquidator: *Pritchard, Englefield, & Co.*, agents for *Boote & Edgar, Manchester.*

Solicitors for other Parties: *Rooke & Sons*, agents for *Earle & Sons, Manchester; Chester & Co.*, agents for *Crofton, Manchester*, and for *Woodall & Marriott, Manchester; Marsland*, agent for *Addleshaw & Warburton, Manchester.*

M. W.

C. A. 1883 — *April* 6.

BALFOUR *v.* COOPER.

[1879 B. 605.]

Settlement—Portions—Interest on Portions charged on Land in Ireland—Right of Donee of Power to fix Rate of Interest—Portions payable out of "rents and profits."

By a settlement made in *England* on the marriage of *D.* certain real estates in *Ireland* were limited to trustees for 1000 years, upon trust by mortgaging the said estates, or out of the rents and profits thereof, to raise £15,000, to be divided among the younger children of the marriage as *D.* should appoint. *D.* appointed the whole of the portions among his children, appointing £4000 to his daughter, to be raised at certain specified times, with interest in the meantime at 5 per cent. The trustees being unable to raise the portions by mortgage, an action was brought to carry the trusts into effect:—

Held (reversing the decision of *Pearson*, J.), that *D.* having only a power of distributing the portions and not of charging them, had no power to fix

the rate of interest; but that the land being in *Ireland* 5 per cent. was the proper rate to be fixed by the Court.

Lewis v. *Freke* (1) and *Young* v. *Lord Waterpark* (2) distinguished.

Held, also, that under the terms of the settlement the trustees of the term had right to apply the rents and profits first in payment of the interest, and secondly in reduction of the capital.

BY an indenture of settlement dated the 27th of June, 1842, made on the marriage of *Otway*, the late Earl of *Desart*, and the Countess of *Desart*, certain lands in the county of *Kilkenny* in *Ireland* were settled to the use of the Earl of *Desart* for life, with remainder to the use that the Countess should receive an annuity of £2000 for her jointure, with remainder to the use of two trustees, of whom the Plaintiff, *J. Balfour*, was the survivor, for the term of 1000 years upon the trusts therein declared, and subject thereto to the use of the present Earl of *Desart* in tail mail, with divers remainders over. And the trusts of the term of 1000 years were declared to be that in case there should be any child or children of the marriage besides an eldest or only son, the trustees should, after the death of the late Earl of *Desart*, or in his lifetime with his consent, by mortgaging or otherwise disposing of the said lands and other hereditaments comprised in the said term, or out of the rents and profits thereof, or by any other ways or means, raise and levy certain sums of money for the portions of the children of the marriage other than such eldest or only son, namely, £5000 if only one such child, £10,000 if only two, and £15,000 if three or more, to be divided between them, and to be interests vested in them and paid to them respectively as the late Earl of *Desart* should by deed or by his will direct or appoint, and in default of such direction or appointment to be divided between them equally at the age of twenty-one if sons, and at twenty-one or marriage if daughters.

There were three children of the marriage other than the eldest son, the present Lord *Desart*, and therefore the £15,000 became raiseable.

By a codicil to his will, dated the 13th of January, 1864, the late Earl of *Desart* appointed that the sum of £5000, part of the sum of £15,000, should be paid to his younger son, *Hamilton*

(1) 2 Ves. 507. (2) 13 Sim. 199.

C. A. 1883 BALFOUR v. COOPER.

J. A. Cuffe, and £6000 to his younger son, *Otway F. S. Cuffe*, at their respective ages of twenty-one years. Both of these sons had attained their full age before the commencement of the present action.

By an indenture dated the 13th of January, 1864, being the settlement on the marriage of the late Earl of *Desart's* only daughter with Lord *Henniker*, the late Earl appointed £4000, the remainder of the sum of £15,000, to Lady *Henniker*, and directed that £3000, part of the sum so appointed, with interest at £5 per cent. per annum in the meantime, should be raised at the end of six calendar months after her marriage, and that the remaining £1000 should be raised at the end of six calendar months from the death of the Dowager Countess *Catherine*, who died in 1874, with interest from her death at the same rate; and by the same indenture the said sums of £3000 and £1000 were assigned to the trustees of the settlement upon the trusts therein declared.

After the death of *Otway* Earl of *Desart* the sum of £5000 and part of the sum of £6000 was raised, and the present action was commenced for the purpose of carrying into effect the trusts of the term of 1000 years.

On the 31st of July, 1880, the Court gave judgment in the action, and ordered the two sums amounting to £4000 due to Lady *Henniker*, and also the sum of £5050 which remained due to *Otway F. S. Cuffe*, to be raised.

Difficulty was found in raising the money by mortgage, and on the 20th of March, 1882, an order was made for a receiver of the estates comprised in the term, and he was directed to keep down the interest on the two sums out of the rents and profits. The receiver tendered interest at £4 per cent. to the persons entitled, which they declined to receive, and a summons was taken out by Lady *Henniker's* trustees asking that the receiver might apply the rents and profits of the estates in reduction of the capital of the two sums of £4000 and £5050, and in payment of interest at £5 per cent. on those sums until they should be paid off. The summons was adjourned into Court and was heard by Mr. Justice *Pearson* on the 3rd of February, 1883.

Mr. Justice *Pearson* refused the application, considering him-

self bound by *Young* v. *Lord Waterpark* (1), and the trustees appealed from his decision.

Robinson, Q.C., and *Owen*, for the Appellants:—

Lord *Desart* having power to appoint the portions among his children had power also to fix the rate of interest which they were to bear till paid: *Boycot* v. *Cotton* (2); *Lewis* v. *Freke* (3); *Sugden* on Powers (4).

If Lord *Desart* had no power to fix the rate of interest the Court will allow the usual interest, and in the case of Irish estates the rule is to allow 5 per cent.: *Leslie* v. *Leslie* (5); *Purcell* v. *Purcell* (6); *Simpson* v. *O'Sullivan* (7); *Lewin* on Trusts (8). Interest at 5 per cent. is sometimes given on portions even in *England*: *Codrington* v. *Lord Foley* (9). In *Young* v. *Lord Waterpark*, on the authority of which Mr. Justice *Pearson* proceeded, the principal part of the estates were in *England*, and therefore the English rule was followed. Here all the land is in *Ireland*.

With respect to the second point, we rely on the words of the settlement, which empowers trustees to apply the rents and profits in payment of the capital of the portions.

Kekewich, Q.C., and *W. Latham*, for Lord *Desart*:—

The late Lord *Desart* had no power to fix the rate of interest. The cases cited by the Appellants are cases where there was a power to charge: and it was held that if a man had a power to charge a sum of money on the land, he might also charge interest for it at a legal rate. But there is no authority laying down that where a person has merely a power of distributing a fund which the settlor has charged, he may fix the rate of interest. Therefore the Appellants are only entitled to the rate allowed by this Court, namely, 4 per cent. The ordinary rule applies, although the land is in *Ireland*. *Young* v. *Lord Waterpark* is conclusive that the question is to be determined by the *lex fori*: *Story's* Conflict of Laws (10). There is here the additional

(1) 13 Sim. 199.
(2) 1 Atk. 552.
(3) 2 Ves. 507.
(4) 8th Ed. p. 697.
(5) Ll. & G. (temp. Sug.) 1.
(6) 2 Dr. & W. 217.
(7) 3 Dr. & W. 446.
(8) 7th Ed. p. 376.
(9) 6 Ves. 364.
(10) Sect. 296 (a).

C. A. 1883

BALFOUR v. COOPER.

fact that the settlement was made in *England*, therefore the English law is the *lex loci contractûs*.

On the second point we contend that there is no sufficient evidence that the money cannot be raised at once by mortgage, and until that is shewn the Appellants are not entitled to have recourse to the rents and profits towards payment of the capital of the portions.

Medd, for the trustees of the settlement.

BAGGALLAY, L.J., after stating the facts as set forth above, said:—

It is stated, and it does not appear to be seriously contradicted, that attempts have been made to raise the sum of £4000 by a proper mortgage, and that from some reason or other, which it does not appear to be very material to go into now, great difficulty has been found in the way of doing so, partly from the disturbed state of Irish property, and partly from other charges having been created by Lord *Desart*. In consequence of these difficulties, the trustees of Lady *Henniker's* marriage settlement come to the Court, and ask to have it declared that her charge of £4000 carries 5 per cent. interest, and not 4 per cent., and to have a direction that the receiver shall pay over to the trustee of the term all the rents and profits as they shall be received, including the balance in their hands, to be applied in the first place in liquidation of the arrear of interest, which amounts to a considerable sum, and in the next place towards gradually liquidating the capital. That is the application made to the Court. A proposal seems to have been made on the part of Lord *Desart* that the receiver should apply the balance in his hands, so far as it extends, to the liquidation of the arrears of interest upon the £4000 at the rate of 4 per cent., Lord *Desart* undertaking that he would by a certain day, which is now passed, or at any rate about the present time, clear off and himself discharge the balance of such unliquidated interest, and that the receiver for the future should keep down the interest upon Lady *Henniker's* £4000, and upon such as remains unprovided for of Mr. *Cuffe's* £5050, *pari passu* at the like rate of 4 per cent.

The Judge appears to have considered the proposal so made on the part of Lord *Desart* a fair one, and he made an order substantially in accordance with the terms I have stated to be the offer of Lord *Desart*. The trustees of Lady *Henniker's* settlement are not satisfied with this view of the case, and they now apply to the Court to declare that they are entitled to 5 per cent. instead of 4 per cent., and that they are also entitled to have the rents and profits as from the time mentioned, applied first in payment of arrears and afterwards in reducing the capital.

The argument so far as regards the rate of interest was twofold. In the first place it was said that the late Lord *Desart*, when he appointed the £4000 in favour of his daughter, about then to be married to Lord *Henniker*, directed that the money should be raised with interest at 5 per cent. upon £3000, part of it, from a certain date, and upon £1000, the balance of it, as from another date, and it was contended, that having regard to the authorities commencing in the time of Lord *Hardwicke*, and continuing, as was suggested, down to the present time, any direction as to the rate of interest given by the party who had the power of charging would be attended to, and that in point of fact he would have the right to fix the rate of interest. And it was further contended that even if the argument, based upon the appointment made by Lord *Desart*, should fail, yet, inasmuch as this was a charge affecting property in *Ireland*, the ordinary rate of interest to be paid upon the portion remaining unraised upon property in that country ought to be 5 per cent. and not 4 per cent. as recognised by the Courts in this country. As regards the first argument in support of the claim to 5 per cent., it cannot, in my opinion, prevail.

The cases of *Boycot* v. *Cotton* (1) and *Lewis* v. *Freke* (2) have been referred to; there is no question that they and other cases establish this, which will be found also quoted in Lord *St. Leonards'* book on Powers (3), that the donee of a power to charge has a right to fix the rate of interest; but they were cases in which there was a donee of the power who had the right of directing whether the charge should be raised, or to what extent it should

(1) 1 Atk. 552. (2) 2 Ves. 507.
(3) 8th Ed. p. 697.

C. A. 1883 BALFOUR v. COOPER. Baggallay, L.J.

be raised. If you examine the case of *Lewis* v. *Freke* (1) closely, it will be found, and particularly from a passage in Lord *Eldon's* judgment, that the rule, that a donee of a power to charge has a right to fix the rate of interest, does not apply to a case where the trustees have a trust vested in them to raise a specific sum of money, and the only power given to anybody in connection with the money so raised is to state in what proportion the money is to be divided between the parties, and at what time it shall be payable. Lord *Eldon* used this expression about the middle of his judgment (2): "If the party entitled to charge or to give interest from the time the fund is to be productive, fixes the rate, the Court cannot control it or diminish it, if he gives more than 4 per cent., or increase it, if he gives less than legal interest. Therefore the course of the Court obtains only where no rate is specified by him who has a right to fix the sum and any rate of interest he thinks proper, not exceeding legal interest." Here it will be found that the trust is to the trustees named in the original marriage settlement of the late Lord *Desart*, namely that they should raise the sum of £15,000, and it was to be divided in such way as I have mentioned, as Lord *Desart* should direct. It appears to me it does not come within the line of cases of which *Boycot* v. *Cotton* (3) and *Lewis* v. *Freke* were examples, and that is borne out by various text-books upon the subject.

I pass on to consider the second argument in support of the claim to interest at 5 per cent.; viz., that the charge affected estates in *Ireland*. A passage in *Lewin* on Trusts (4), cited in the course of Mr. *Robinson's* argument, sums up the authorities as to the rate of interest which should be allowed in respect of portions when charged upon Irish estates as distinguished from portions charged upon English estates, such rate being 4 per cent. in the case of charges upon English estates, and 5 per cent. in the case of charges on Irish estates. I need not read the passage again. The case of *Young* v. *Lord Waterpark* (5) has been quoted as an authority that the rate of interest should in the present case be 4 per cent., as being the rate of interest

(1) 2 Ves. 507.
(2) Ibid. 512.
(3) 1 Atk. 552.
(4) 7th Ed. p. 376.
(5) 13 Sim. 199.

according to the *lex fori*. The last edition of Mr. *Lewin's* book brings the cases down to a recent period, viz., 1879; it was published after his death. I gather from it that he did not regard *Young* v. *Lord Waterpark* (1) as the case of an Irish estate being dealt with in *England*, and therefore giving effect to the law of the *forum*, and not to the law of the country where the property was situate; but as a case in which the property was dealt with as English property. In that case there was both English and Irish land, and it would have been almost impossible for the Court to direct a sum of money to be raised out of English and Irish property together, and to direct that on so much as was raised out of English property 4 per cent. should be paid, and on so much as was raised out of Irish property 5 per cent. That would have led to confusion. The English Court was dealing with the property. The English portion of the property was immediately under the control of the English Court, and therefore the whole was properly dealt with as English property. I think, as far as the present case is concerned, we are bound by the decisions in the Irish Courts, and therefore to that extent the appeal will succeed, and the rate of interest will be 5 per cent., and not 4 per cent. With reference to *Young* v. *Lord Waterpark*, I desire to add that, unless the decision can be explained in the manner I have stated, it is, in my opinion, at variance with the recognised line of authority.

Then as regards the other portion of the appeal, namely, as to that part of the order which directs the receiver only to keep down future interest, and not otherwise directing him to apply any part of the rents and profits to capital, I confess that for a long time I was very adverse to the view put forward by Mr. *Robinson*, but upon a more full and complete consideration of the whole case I think the language in which the trust is expressed is too strong to be got over. The receiver was appointed after the hearing of the cause, and after it was found that there was a difficulty in giving effect to the decree as originally pronounced; but I am disposed to think that this is a case in which effect should be given in accordance with the strict language of the terms of the trust. The terms of the trust are these, that the

(1) 13 Sim. 199.

C. A. 1883 BALFOUR v. COOPER. Baggallay, L.J.

trustees "should after the decease of Earl *Desart*, or in his lifetime with his consent, signified by some writing under his hand, by mortgaging or otherwise disposing of the said lands and other hereditaments comprised in the said term of 1000 years, or any of them, or any part thereof, for the whole or any part of the same term, or out of the rents and profits thereof, or by any other ways or means raise and levy, &c." I should have been very glad if an arrangement could have been come to as to the application of the rents and profits until some further endeavours had been made to ascertain whether the amount could not be raised by mortgage. It is admitted, however, on both sides that the parties are now here upon their strict rights, and it appears to me that the strict right of the Appellants is to have the order made as asked. I wish also to say that, though we have been asked to act upon the assumption that a mortgage cannot be effected, I am not satisfied upon the affidavits, and the other statements which have been made, that every effort has been made which might have been made for the purpose of raising this fund. That cannot, however, affect the decision at which we ought to arrive in this case. In both respects, as regards the amount of interest and the application of the rents and profits to payment of capital, I think the appeal must succeed.

LINDLEY, L.J.:—

I am of the same opinion. The first question to my mind is to consider the settlement of 1842, and the rights of the parties under it. It is a settlement of Irish property upon certain trusts. It is not what is commonly called a contract, but in some sense every marriage settlement is a contract. There is no contract to pay a particular sum of money, that is to say, there is no personal obligation to pay in pursuance of what is ordinarily called a contract. It does not appear to me that a case of this kind is at all within the general rules referred to by Mr. Justice *Story*. There is a direction contained in the settlement as to what is to be done with the land in *Ireland*. The direction is that out of certain land in *Ireland* £15,000 is to be raised in certain events. There is a clause in the settlement which says that during the minority of the persons entitled to £15,000 it shall be lawful for the trustees

to apply the rents and profits, not exceeding interest at the rate of 4 per cent., towards their maintenance and education. I thought at first that shewed that 4 per cent. only was to be the rate of interest borne by the £15,000, but upon reflection I do not think that that is so. It is not exceeding that. One can see that the trustees are not to apply more than a certain sum—that there is a limit put to the maximum which they are to expend. It does not really throw any light upon the question which we have to consider, namely, what rate of interest, if any, is to be borne by the £15,000 after it becomes payable to the children under any appointment? The settlement says nothing at all about it—it is merely £15,000 and nothing is said about interest.

The first question is whether any interest is payable upon the £15,000, and if any interest is payable at what rate it is payable? Can the rights of the parties in reason depend upon whether the proceedings in relation to the execution of these trusts are taken in *Dublin* or *London?* I think not. Their rights must depend upon the law as applied to land in *Ireland*, and the trusts to be worked out by the sale or mortgage of those lands. When we find, as we do, that under a settlement such as this the rule is that charges of this kind are in *Ireland* deemed to bear interest at 5 per cent. it appears to me that interest at that rate ought to to raised by the trustees unless there is some authority to the contrary. It is said that *Young* v. *Lord Waterpark* (1) is a decision to the contrary. The case of *Young* v. *Lord Waterpark* is reported so shortly that I am not sure I thoroughly understand it; but as I understand it it was this: There was a sum of £10,000 to be raised out of a single term of 500 years out of some lands in *Ireland* and *England*—one trust to raise one sum out of one term; and it does not appear that any part of that £10,000 was charged upon any part of the Irish estates in particular, or upon any part of the English estates in particular. That seems to me to make a considerable difference between that case and this. Whether the Vice-Chancellor went upon that principle or not I do not know—I am not sure that he did not go on another principle, namely, that the settlement said nothing about interest, and therefore he considered what he would give interest in the

(1) 13 Sim. 199.

C. A. 1883 BALFOUR v. COOPER. Lindley, L.J.

shape of damages. However I must confess that I do not quite understand that case. It appears to me, for reasons I have pointed out, that it is so substantially different from this case that I do not feel myself compelled to adopt the same view. The principle that is applicable to this case is that to which I have referred, and if that is so it becomes immaterial to consider what the effect of the appointment with respect to the £4000 was. If the £15,000 bears interest at £5 per cent. the appointment of £4000 with interest at £5 per cent. is unobjectionable. If however I am wrong, if the £15,000 only bears interest at 4 per cent., then it appears to me that *Lewis* v. *Freke* (1) is no authority for the appellant; for there the power was a power to charge, and it seems to be settled by that case and others that if there is a power to charge there is a power to charge interest. This is a trust to raise a particular sum of money, with a power of apportionment; and the distinction between that case and this is obvious when it is closely examined.

I pass now to the second point, namely, what are the rights of the trustees in this term of 1000 years under the circumstances which now exist? The case was set down as a short cause asking that the trusts might be carried into execution. Then they obtained the appointment of a receiver, with direction that this sum of money should be raised by mortgage. That has not been done, and I am satisfied it cannot be done. We are asked now to make an order that the receiver shall pay off the second charge out of the rents and profits. Are they entitled to that or not? That depends upon the terms of the settlement, and the terms of the settlement are in their favour upon that point as they cannot raise the money by other means. Consequently the order of Mr. Justice *Pearson* must be discharged, and an order made in the terms of the notice of motion. It is made without prejudice to any application by the mortgagees. I do not suppose that any question of priority arises.

Solicitors for Appellants: *Maples, Teesdale, & Co.*
Solicitors for Respondent: *Freshfields & Williams.*

(1) 2 Ves. 507.

M. W.

In re GODFREY.
GODFREY *v.* FAULKNER.

[1880 G. 50.]

V.-C. B.
1883
May 24, 25.

Trustee and Cestui que Trust—Mortgage—Advance on Valuation made on behalf of Vendor of Mortgagor—Failure of Security—Advance to more than Two-thirds of Estimated Value—Liability of Trustees.

In May, 1870, *F.* and *G.*, the trustees of a will, one of whom, *F.*, was an experienced farmer, and the other, *G.*, a solicitor, advanced a sum of £2400, part of the trust estate, along with another sum of £2600, not part of the estate, making together £5000, at £4 per cent., on the security of a freehold farm, which in 1868 had been sold to the mortgagor, who was farming that and neighbouring land on a peculiar system of husbandry. The trustees had power to advance on contributory mortgages. In 1868 the farm had been valued on behalf of the vendors, of whom *G.* was one, and also the solicitor, at £6895. This valuation was communicated to *F.* at the time of the mortgage; and no other valuation was made. Interest was paid in full, but irregularly, down to November, 1877, since which time the farm, which was situated on clay soil, in a wet situation, had become unsaleable and unlettable, owing to unfavourable seasons, and had yielded no income. The mortgagor became insolvent.

Upon claim by the *cestui que trust* against *F.* and the executors of *G.* to be declared entitled to payment of the £2400 and interest since November, 1877:—

Held, notwithstanding that no valuation was used at the date of the mortgage other than the valuation made on behalf of the vendors at the time of the sale to the mortgagor; that *G.*, the trustee, was himself one, and solicitor of the others, of the vendors to the mortgagor; and that the sum advanced was more than two-thirds of the estimated value of the farm—that the trustees were not liable to make good the deficient security.

The test of liability always is, whether or not the trustees have acted as prudent men would have acted in dealing with their own property.

The "two-thirds" rule is not enforceable with exact strictness.

IN September, 1868, *Edward Taylor Middleditch*, a farmer, was in treaty for the purchase from the trustees of *Christ's Hospital, Abingdon*, of a freehold farm containing about 150 acres, called *The Hospital Estate*, situate at *Broad Blunsdon, Wilts.* A Mr. *Crowdy*, of *Highworth*, near *Faringdon*, acted as his solicitor.

On this occasion the farm was (on the 5th of September, 1868), valued on behalf of the trustees by *William Bryan Wood*, of *Chippenham*, surveyor, at a sum of £6800, exclusive of timber, which

V.-C. B.
1883
In re GODFREY.
GODFREY *v.* FAULKNER.

was afterwards valued at £95 1*s.* 9*d.* *Middleditch* agreed to carry out the purchase at this valuation, and by a deed dated the 17th of August, 1869, the farm was conveyed to *Middleditch*, in consideration of £6895 1*s.* 9*d.* *Middleditch* was desirous that part of the purchase-money should be allowed to remain unpaid on the security of the farm, and on the 30th of November, 1869, Mr. *Daniel Godfrey* (since deceased), of *Abingdon*, solicitor to the hospital and one of the hospital trustees, wrote to *Crowdy* to say that his (*Crowdy's*) client's proposal had been submitted to the Charity Commissioners, and if it should not be acceded to, a client of theirs (the firm of *Godfrey & Son*) would advance the sum (£5000) if he (*Crowdy*) did not provide it himself. On the 20th of December, 1869, *Crowdy* was informed that the Charity Commissioners refused the proposal.

At this date *Godfrey* was the acting trustee under the will of the testator in the action, *Thomas Carey Godfrey*, who died on the 20th of April, 1858. By his will, dated the 11th of December, 1856, the testator demised and bequeathed to the Defendant *William Carey Faulkner* and to *Daniel Godfrey* his real estate, and also his personal estate not specifically bequeathed, upon trusts which were in substance, as to two-sixths, in favour of his son, *Thomas William Faulkner Richard Godfrey*, and as to two other sixths, in favour of another son *Auberon Ernest Godfrey*, if and when they should respectively attain twenty-one, with a provision that if either should die under age without having any issue who should survive him, his share was to be in trust for his brother. The widow took no interest under the will beyond a life estate in certain furniture and effects. The testator expressly appointed his executor, *Daniel Godfrey*, to be "solicitor to the trust estate," and empowered him to charge against the estate for his professional costs. He also empowered his trustees to invest the trust moneys in mortgages of the description "usually known as contributory mortgages."

The testator's son *Thomas W. F. R. Godfrey* attained twenty-one, and died shortly afterwards, on the 20th of May, 1873, having by will bequeathed all his real and personal estate (with an exception which did not apply to what he took under his father's will) to his mother, the Plaintiff, *Fanny King Godfrey*, widow,

absolutely; and in about 1873 the Plaintiff, as executrix of her son, settled with *Faulkner* and *Godfrey*, as trustees of the testator's will, for her son's two-sixths, amounting in all to the sum of £2158 15*s*. On the 29th of October, 1876, the other son, *Auberon E. Godfrey*, died under age, and without having been married, whereupon his two-sixth shares under the testator's will also became vested in the Plaintiff as executrix of her son *Thomas*.

On the 24th of December, 1869, *Daniel Godfrey* wrote to his co-trustee, the Defendant *Faulkner*, as follows: "Will you join the £2400 lately paid in from *Coleman's* mortgage, belonging to our trust for Mrs. *Godfrey* and her children, with £2600 I have to advance from another quarter, to make £5000 at £4 per cent. upon a freehold farm of 147*a*. 1*r*. 3*p*. near *Highworth*, lately purchased for £7000? If so, I will get the security completed as soon as I can, to produce Mrs. *Godfrey* better interest than she now gets upon deposit at the *London and County Bank* of the £2400. The money is wanted for five years, which I presume you would not object to."

On the following day (the 25th) the Defendant *Faulkner* answered: "I have no objection to your lending Mrs. *Godfrey's* money on the security you name, provided you think it desirable to do so. I suppose you cannot get a ¼ or ½ per cent. more. I have no doubt it would be very acceptable to her."

By the expression "Mrs. *Godfrey's* money" was meant the income of her sons' contingent shares, which she was then receiving as their guardian.

On the 28th of December, 1869, *Godfrey* wrote again to *Crowdy* to the effect that they (*Faulkner* and *Godfrey*) were willing to make the advance at 4 per cent. for five years, but they wished to see Mr. *Bryan Wood's* valuation.

On the 21st of January, 1870, *Bryan Wood's* valuation was sent by *Crowdy* to *Godfrey & Son*, and on the 25th of March, 1870, *Godfrey* wrote to *Crowdy* as follows: "My client and co-trustee, Mr. *W. C. Faulkner*, and I went over this property with Mr. *Middleditch* yesterday, and Mr. *Faulkner* is satisfied with the security."

The mortgage of the *Hospital Farm* by *Middleditch* for the sum of £2600 in favour of a Mrs. *Charlotte Faulkner*, and for the sum of

V.-C. B.
1883
In re GODFREY.
GODFREY *v.* FAULKNER.

£2400, part of the testator's trust estate, to Messrs. *Faulkner* and *Godfrey*, was dated on the 24th of May, 1870.

Upon the death of *Thomas W. F. R. Godfrey*, the Plaintiff, Mrs. *Godfrey*, became, as above stated, entitled to his two-sixth shares, and the above-mentioned settlement of accounts was come to. Under that settlement a sum of £1931 10*s.* 1*d.* was found due to the Plaintiff, which was paid off by a sale of consols: all but a sum of £241 5*s.*, which remained on the security of the mortgage. Afterwards, when the second son, *Auberon*, died, the Plaintiff became entitled to a further sum of £2158 15*s.*, making together a total of £2400, which also remained on the same security.

On the 9th of February, 1877, the trustee *Daniel Godfrey* died, having, by will dated the 20th of November, 1875, appointed the Defendants *Robert Seppings Godfrey*, *Edward Crotch Godfrey*, and *John Thornhill Morland*, his executors.

Interest on the mortgage debt down to the 24th of November, 1877, was paid to the Plaintiff, the last payment having been made in January, 1878. Since then, owing to wet and unfavourable seasons, the farm had been unsaleable and unlettable, and there being no tenant it had yielded no income. The mortgagor, *Middleditch*, had failed in his farming speculations and become insolvent.

The action was commenced by writ issued on the 25th of February, 1880, by Mrs. *Godfrey* against *W. C. Faulkner*, the surviving trustee, and the three executors of the deceased trustee; and the amended statement of claim, delivered on the 29th of November, 1880, alleged that since the death of *Auberon E. Godfrey* the Plaintiff had made repeated applications to the trustees for the sums of £2158 15*s.* and £241 5*s.* left on the security of the mortgage; that the farm was not, and never was, a proper security for the trust moneys lent upon it; that it was purchased by *Middleditch* through the agency of *Daniel Godfrey* at an accommodation price; that no valuation was made on the occasion of the mortgage; that the trustees acted upon an erroneous valuation made on behalf of the vendors to *Middleditch*, and advanced too large an amount even on that valuation. Further, that the two sums with an arrear of interest were due and owing to the

Plaintiff; and that the Defendants, though frequently requested to pay the same, had neglected and refused so to do. The claim was for a declaration that the Defendant *Faulkner* and the estate of *Godfrey* were jointly and severally liable to pay and make good to the Plaintiff the two sums, amounting to £2400 and interest; for an order for payment; to have an admission of assets by the three executor Defendants; and for accounts and inquiries, and if necessary, administration.

The Defendants, the executors of *Godfrey*, in an amended statement of defence, delivered on the 6th of May, 1880, denied the frequent requests alleged by the Plaintiff, and asserted that she frequently expressed a desire that the mortgage should not be interfered with; denied that it was not and never was a proper security; denied that the property was bought at an accommodation price; denied that *Faulkner* and their testator acted on an erroneous valuation, or that they advanced too large an amount on the valuation; and submitted that at the time of the loan and mortgage the farm was a security of sufficient value; that the trustees took every step which, as trustees, they were bound to take for obtaining a proper security; and that if there was some temporary difficulty in finding a tenant or a purchaser, the Defendants, as executors of *Daniel Godfrey*, were not liable to make good the two sums and interest.

The amended statement of defence of the Defendant *Faulkner* (delivered on the 11th of January, 1881) was to the like effect.

William Bryan Wood made an affidavit, sworn on the 20th and filed on the 30th of June, 1881, on behalf of the Plaintiff, but was too unwell in health to undergo cross-examination. He said he made the valuation for the purpose of a sale by the trustees of the Hospital, and for the satisfaction of the Charity Commissioners, who, he knew, always expected to receive a valuation rather more in favour of the vendor than the purchaser. *Middleditch* was the owner of an adjoining farm. He said he valued the farm "at a price which I considered the said Mr. *Middleditch*, as such adjoining owner as aforesaid, might fairly be asked to give. I considered the said *Hospital Farm* capable of improvement, and I added a sum of £500 for latent value in consequence of its capability for improvement. I should not have valued the said

V.-C. B.
1883
In re GODFREY.
GODFREY *v.* FAULKNER.

Hospital Farm in the same way on behalf of an intending mortgagee. My valuation was not intended for and would not have been applicable to the case of a mortgage loan. I should not in that case have added anything for latent value."

The book of rates for the *Broad Blunsdon* division of *Highworth* parish, made in May, 1868, gave for the *Hospital Farm* a gross estimated rental of £155 5*s.* 5*d.*, and *Webb*, the ex-overseer, deposed on behalf of the Plaintiff that this would have been a full rent for the farm.

Mr. *Faulkner* deposed that when the valuation of Mr. *Bryan Wood*, who was known as a surveyor of great eminence, was produced to him by *Godfrey*, he said he must leave the question of the loan of £5000 to his decision, and *Godfrey* answered that he was quite satisfied, and that the security was sufficient. The valuation appeared to the deponent to be a just and proper valuation, and in consenting to make the advance he was guided solely by the valuation and *Godfrey's* advice.

He further said, "From my own personal experience as a landowner and farmer I know that in the year 1870 and for some years afterwards, land of the character of the *Broad Blunsdon Farm*, which is heavy land, was in demand. The value of farming produce was then high, and there had been a succession of dry seasons. Since 1877, however, down to the present year, a succession of wet seasons has waterlogged land of this character beyond the power of modern drainage, and thoroughly impoverished it, while the price of farming produce has fallen and depression has fallen on the agricultural interest to an enormous and frightful extent, so that acres upon acres of heavy land in the Midland counties which used to command high rents have practically fallen out of cultivation, and now cannot command any rent or market."

The evidence of Mr. *Middleditch* on behalf of the executor Defendants, contained the following statement:—

"The price of land in the neighbourhood of *Broad Blunsdon* for several years after the date of the said mortgage and until a succession of bad harvests which occurred in the years 1875 to 1880, occasioned by wet and unfavourable seasons and a large increase in the shipments of corn from *America* to this country,

concurred in producing a great depreciation in the prices of farm produce and in the value of farming land, and the great depression in agricultural pursuits which exists and has existed for the last five years. I am confidently of opinion that these circumstances only have prevented me from carrying on the *Hospital Farm* at a profit, and have reduced it from an ample and sufficient mortgage security for the sum of £5000 to an insufficient one. The *Hospital Farm*, being heavy land, has been more affected by the wet seasons than any other class of land."

Mr. *Edward C. Godfrey*, one of the Defendants, deposed that the Plaintiff, on the 8th of September, 1873, wrote to his father saying she was desirous that her son *Auberon's* two sixth parts of the property should remain mortgaged to Mr. *Middleditch*; that on the 13th of September she wrote, "I am desirous that the mortgage on Mr. *Middleditch's* estate should not be interfered with;" that in April, 1875, she wrote, "In future, if Mr. *Middleditch* cannot pay the interest on the mortgage when it becomes due, I shall feel obliged by your applying to him for interest on the amount." She expressed no urgent wish that the mortgage should be paid off until the 10th of September, 1880, when she wrote, "I am sorry to hear that Mr. *Middleditch's* mortgage is not yet paid off, but trust you will press the matter without delay."

Mr. *Jonas*, of the firm of *Drivers & Co.*, estate agents, deposed for the same Defendants (23rd of December, 1881) as follows:—

"In the month of July, 1877, my said firm was instructed, on behalf of Mr. *Middleditch*, of *Blunsdon House*, in the county of *Wilts*, to sell a freehold estate belonging to the said Mr. *Middleditch*, situate at *Broad Blunsdon*, comprising in the whole 670 acres or thereabouts, including a farm called the *Hospital Farm* containing 150 acres or thereabouts, and in preparation for the said sale I made a detailed valuation of the said estate, including the fields and parcels of land and buildings of the said *Hospital Farm*.

"I have lately examined the said detailed valuation, and have abstracted therefrom the values which I then placed on each of the fields belonging to the *Hospital Farm*, and after deducting the land-tax, tithe, rent-charge, and an allowance for the necessary repairs, I have worked out our said valuation in fee simple of the said estate, and I find that in July, 1877, my said firm were of

V.-C. B.
1883
In re GODFREY.
GODFREY *v.* FAULKNER.

opinion that the *Hospital Farm* portion of Mr. *Middleditch's* said estate was well worth the sum of £7500, exclusive of the timber thereon, which is at the rate of about £50 per acre. I also find that the reserves placed upon the several lots by us in contemplation of the abortive sale in 1877 were at a higher rate per acre than what we valued the *Hospital Farm* portion of the estate at. Not a single lot was sold at the said sale, and I think it is very doubtful whether we should have sold much even if the reserves had been fixed at a somewhat lower rate. The depression in the agricultural industry was then beginning to be felt, and has gone on increasing ever since, insomuch that each succeeding year has told severely on the resources of the persons engaged therein. The land of the *Hospital Farm* for the most part is strong, that is to say, it is naturally a wet retentive soil. It is very productive, especially for corn crops, and has been well drained by the *Lands Improvement Company*. I am unable to state to what extent the *Hospital Farm* has declined in value during each of the last four years. It is an estate that was for some years farmed on the peculiar system now pursued by Mr. *Prout* at *Harlow*, and advocated in his recent work entitled '*How to Farm Clay Land Profitably*,' but I do not think this has in any way injured the selling value of the property. I do not see reason to apprehend any permanent depreciation in landed estates in general or in this farm in particular, as the chief cause for the present depression is the succession of disastrously wet and unproductive seasons."

In March, 1879, the farm was again put up for sale, but without success.

Horton Smith, Q.C., and *Blakesley*, for the Plaintiff:—

Not only was no proper valuation taken on behalf of the trustees of the will, but the valuation that was taken was not even taken on behalf of the mortgagor—it was the valuation that was made on behalf of vendors to the mortgagor, and which the valuer himself has deposed was an enhanced value. Under these circumstances, the security proving deficient, trustees are personally liable: *Ingle* v. *Partridge* (1).

(1) 34 Beav. 411.

The security was insufficient from the first. Trustees are not justified in advancing more than two-thirds of the value of landed property: *Lewin* on Trusts (1). £5000 exceeds two-thirds of this valuation, namely, £4596 14*s.* 6*d.* They required £200 a year, and they took an estate which at its best yielded only £155. Hence they must be held liable: *Budge* v. *Gummow* (2).

Hemming, Q.C., and *Rawlinson*, for the executors of *Godfrey*:—

The question is solely one of law.

The established rule is, that a trustee is bound to exercise as much care as if he were dealing with his own property. The "two-thirds" rule, so far as it can be called a rule, is only an arbitrary one. The real rule is that a trustee must deal with trust property as a prudent man would deal with his own, and nothing more.

The substance of the case is that the trustees relied upon *Bryan Wood's* valuation. But in the first place the Plaintiff did in fact, in 1873, acquiesce in the security; and this was not, as in *Ingle* v. *Partridge* (3) a valuation made on behalf of the mortgagor, though made, no doubt, on behalf of vendors to the mortgagor. In *Jones* v. *Lewis* (4) where trustees had, in the opinion of the Court, acted honestly, although they had advanced £250 more than the two-thirds value, and there was an insufficiency, they were held not liable for the loss.

Horton Smith:—That case was "reversed on appeal," says Mr. *Lewin* (5), "it is believed by Lord *Truro*, on the 26th of February, 1852, but on what grounds not known."

Hemming:—At any rate, in *Speight* v. *Gaunt* (6) the Court of Appeal, consisting of the late Master of the Rolls (*Jessel*), *Lindley*, and *Bowen*, L.JJ., in January, 1883, restored to its old vigour Lord *Hardwicke's* rule in *Ex parte Belchier* (7), which had been overlaid by decisions of Courts of first instance, where a trustee was held not responsible for the failure of a broker employed by him in the ordinary course of business.

(1) 4th Ed. p. 242.
(2) Law Rep. 7 Ch. 719.
(3) 34 Beav. 411.
(4) 3 De G. & Sm. 471.
(5) Page 242.
(6) 22 Ch. D. 727.
(7) Amb. 218.

V.-C. B.
1883
In re GODFREY.
GODFREY v. FAULKNER.

Budge v. *Gummow* (1), in which the trustees were held liable, was a gross case. A public-house not worth more than £800 or £900 was valued at £1900, ultra the license, which was valued at £800, making £2700 in the whole, and the Court of Appeal thought that one of the trustees "must have known" it was not worth even £1900.

Here the whole case against us is that Mr. *Faulkner*, a landowner and farmer, and the late Mr. *Godfrey*, both capable men, both disinterested, and against whom no imputation is made, meet, examine the property, and come to the conclusion that it is a good security.

The two-thirds rule is not adhered to by private owners. The great lenders, such as insurance offices, for example, always advance to more than two-thirds, and the consequence is that no private lender can get a good security unless he is prepared to do the same.

[BACON, V.C.:—I cannot adopt that as fact.]

Of course there is no actual evidence of it, but the *onus*, in this instance, is not on the trustees; the *onus* is on the *cestui que trust* to establish such negligence as will make the trustees liable.

Millar, Q.C., and *Vernon R. Smith*, for the Defendant *Faulkner*:—

The principles on which the Court acts are fully elucidated in *Speight* v. *Gaunt* (2).

Here, besides delay, we have the undisputed evidence of the cause of failure, namely, temporary agricultural depression.

Horton Smith, in reply:—

In addition to the facts that the valuation was made on an enhanced estimate furnished to the mortgagor's vendors, there is this, that *Godfrey* one of the vendors himself volunteered to advance the money. The case is thus brought within Lord *Cottenham's* rule in *Clough* v. *Bond* (3).

(1) Law Rep. 7 Ch. 719. (2) 22 Ch. D. 727.
(3) 3 My. & Cr. 490, 496.

BACON, V.C.:—

No doubt it is the duty of a trustee, in administering the trusts of a will, to deal with property intrusted to his care exactly as any prudent man would deal with his own property. But the words in which the rule is expressed must not be strained beyond their meaning. Prudent business men in their dealings incur risk. That may and must happen in almost all human affairs. So that, not intending, so far as I am concerned, to relax the strict meaning of the rule I have referred to, still I must consider that that rule is the only one I have to attend to in this case.

A great deal of time has been spent—I do not say uselessly spent—in going through all the smaller details in this case, all the steps that were taken, all the letters that were written, all the accidents that happened, and so on; but after all it must come back to this; the Plaintiff says, "You the Defendants have wronged me. You were intrusted with my money to lay out as a prudent man would lay it out. You have not discharged that duty; so therefore pay me back my money."

That is the whole case. The facts are simple enough in themselves. I should observe there is no suggestion of bad faith, culpable negligence, or misconduct by any one of the parties here concerned. They are all respectable people, and throughout the transaction have conducted themselves as respectable people do. The case begins with the will of a Mr. *Godfrey*, who gives his estate upon trust to Mr. *Faulkner* and Mr. *Daniel Godfrey*. He does not enlarge the duty of the trustees—does not curtail it in any respect—and does not exempt it in any way from the general rule I have referred to. There is this feature also. Having great confidence in one of the trustees by reason of his professional capacity, he desires that he shall be the person to conduct professionally the operations incident to these trusts which are to be executed. I pass over what it is now unnecessary to advert to. There came a time when the trustees, in the exercise of their discretion, were called upon to deal, or thought it right that they should deal, with a sum of £2400. Now the particulars of that are contained in the evidence which has been adduced, and they consist of a letter from Mr. *Daniel Godfrey* to Mr. *Faulkner*, his co-trustee, dated the 24th of December, 1869, and it is quite

V.-C. B. 1883 *In re* GODFREY. GODFREY *v.* FAULKNER.

necessary to attend to the correspondence, because that speaks plainly of what it is said they intend to do, and we must take it that what they said they meant, and what they meant they did. The letter is this: [His Lordship read the letter of Mr. *Godfrey* cited above, and the answer of Mr. *Faulkner* on the following day, and continued:—]

Those are very business-like, plain letters. Nobody can impute to the trustees that they disregarded the Plaintiff's interest. The estate had been purchased for about £7000, and the circumstances under which that purchase was made are those on which the Plaintiff mainly relies to establish the charge of culpable negligence against the trustees. What do they turn out to be? The Charity Corporation having this estate to sell employ a man to value. He values the estate; his evidence has been read, and the result of it is that he valued it at an excessive price, at more than its real value, and he explains in the evidence why he did that. He says: "I valued it, not for a mortgage, but I valued it for the owners to guide them in the sale they were about to make at £6890, exclusive of timber." Mr. *Godfrey* was a member of the corporation that was going to sell this property, and he was one of the persons who had employed Mr. *Wood* to make the valuation, so that he was in possession of the fact of Mr. *Wood's* notion that the seller might ask £7000 for it. What a vendor may ask is one thing, what he may accept is another; but neither one nor the other furnishes a reasonable ground for saying what is the true value of the thing to be bought. Having sold this to *Middleditch* for nearly £7000, Mr. *Godfrey* proposes to his co-trustee to take a mortgage for £5000. Is there any imprudence in that? Putting the rule as strictly as you like, and considering the matter as if Mr. *Godfrey* had been dealing with his own interest, is there anything very unreasonable in what he did? In perfectly good faith, and with a perfectly pure desire to do all that they could for Mrs. *Godfrey*, the two trustees think that this is a reasonable transaction for them to enter into. How does that come within the rule which I have referred to? I can see nothing that was imprudent in what was done here. If times had been better, and if *Middleditch's* expectations in managing this farm in that neighbourhood had been realized, the security would have been a

perfectly good one. For several years from the date of the mortgage up to 1877 the interest was paid, though irregularly. I suppose there is a large proportion of cases in which the interest on mortgage money is not paid on the quarter day or the half-yearly day on which it is due. But interest was paid up to 1877; and the evidence is, that since then farming has been so bad that farmers who had been doing well before have been reduced to the utmost extremity—*Middleditch* has become insolvent—and the property is not now saleable.

There is one thing which has not been very much observed upon. I will read the evidence of Mr. *Jonas* in this matter, which is in my opinion very well worth attending to. Mr. *Jonas* says that in July, 1877, he was instructed on behalf of *Middleditch*, that he then made a detailed valuation of the land of the *Hospital Farm*, that the *Hospital Farm* portion of *Middleditch's* estate was well worth the sum of £7500, exclusive of the timber thereon, which was at the rate of about £50 per acre. That the reserves placed upon the lots in contemplation of an abortive sale in 1877 were at a higher rate than that at which he valued the farm. That is evidence on which I am asked to say that these two trustees did, wilfully disregarding their duty to their *cestui que trust*, take a mortgage for £5000 on this estate which was bought for nearly £7000, and that they have therefore made themselves personally liable for all the loss that has ensued by reason of the disaster which has since fallen upon the property.

Now the case of *Speight* v. *Gaunt* (1), which has been so much referred to, contains some observations which I may as well read. The Master of the Rolls examined all the authorities and, having gone into the matter with very great minuteness, says (2) this: "I think it is the duty of the Court in these cases where there is a question of nicety as to construction, or otherwise, to lean to the side of the honest trustee, and not to be anxious to find fine and extraordinary reasons for fixing him with any liability upon the contract. You are to endeavour as far as possible, having regard to the whole transaction, to avoid making an honest man who is not paid for the performance of an unthankful office liable for the failure of other people from whom he receives no benefit. I think that is the view which has been

(1) 22 Ch. D. 727. (2) 22 Ch. D. 746.

V.-C. B. 1883 *In re* GODFREY. GODFREY *v.* FAULKNER.

taken by modern Judges, and some of the older cases in which a different view has been taken would now be repudiated with indignation." If I were to adopt that as a proposition of law and apply that to this case what can I find to blame in the conduct of these trustees?

Then there is the arithmetical point. It is said that, without taking into account what Mr. *Wood* has designated owing to certain circumstances "the latent value," the amount advanced was more than two-thirds of the estimated value of the security; and then, it is said, the "two-thirds" rule has been departed from. But the two-thirds rule has never been applied with mathematical exactness where the amount has been exceeded by such a proportion as £300 or £500 bears to the sum advanced in this case.

The test has always been—Is this what a prudent man of the world would have done with his own money? And then, because Mr. *Godfrey*, who was advised that the property was worth £7000, and Mr. *Faulkner*, himself a skilful agriculturist, advanced some £400 more than two-thirds of the estimated value of the estate, I am asked to fix these two honest men—one living and the other through his representatives—with the consequences of having exercised their thankless office as they have done, and why? Unfavourable weather has caused disaster to fall upon the agricultural interest, and to that alone is to be ascribed any loss that has been sustained. I make no such order as has been asked for. Keeping to the rule I have before mentioned, and with a perfect desire to do justice between the parties, and to see, as far as I am concerned, that the doctrine is unimpaired which makes trustees liable for acts they perform in the discharge of their duty, I decline to make any such decree as is asked for in this case.

The action will be dismissed, but without costs; and the trustees will be at liberty to take their costs out of the estate.

Solicitor for the Plaintiff: *R. J. Child*, agent for *E. Ormond, Wantage.*

Solicitors for the Defendant *Faulkner*: *Lovell, Son, & Pitfield*, agents for *Dayman & Walsh, Oxford.*

Solicitors for the other Defendants: *Newman, Stretton, & Hilliard.*

J. B. D.

PINNOCK *v.* BAILEY.

V.-C. B.
1883
May 29.

Mortgage—Fund in Court—Priority—Stop Order—Notice.

As against a stop order obtained by an incumbrancer upon a fund in Court in an administration suit, and in respect of which orders have been made directing payment of interest to the parties entitled, notice to the trustees, though given by another incumbrancer before the stop order was obtained, does not give priority.

ADJOURNED SUMMONS raising a question of priority between the mortgagees of a fund in Court.

By the decree made in 1857 the trusts of a settlement of October, 1835, were directed to be carried out, and, in case it should be ascertained that a sale would be fit and proper, it was ordered that the trust estate should be sold and the proceeds paid into Court to the credit of the cause.

In November, 1866, the Chief Clerk certified that the estates comprised in the settlement had been sold, and that the purchase-moneys had been paid into Court at various times between the beginning of 1860 and the end of 1864.

By the order on further consideration made on the 27th of June, 1867, after directing taxation and payment of subsequent costs and payment of the auctioneer's charges out of the fund in Court, directions were given for payment of the interest on the residue of the fund to the persons named in the order.

On the 16th of September, 1863, *Mortimer Pinnock*, one of the persons entitled under the settlement, mortgaged his share to *James Bailey* to secure £1250 and interest. *Bailey* did not give notice of this mortgage to the trustees of the settlement, but on the 6th of January, 1877, he obtained a stop order.

On the 17th of September, 1867, *M. Pinnock* mortgaged his share to *W. L. Dobson* without giving notice of the prior charge in favour of *Bailey*. *Mary Adela Pinnock*, another person entitled under the settlement, joined in this mortgage as surety for *M. Pinnock* and charged her share as collateral security. On the 3rd of June, 1875, *Dobson* gave notice of his charge to the trustees of the settlement, but did not obtain a stop order.

V.-C. B.
1883
PINNOCK
v.
BAILEY.

The Chief Clerk, in answer to inquiries directed by the order made on second further consideration in June, 1882, having certified that *Dobson* was entitled in priority to *Bailey*—on the ground that notice to the trustees was as effectual as a stop order (see *Thompson* v. *Tomkins* (1)), and being first given by *Dobson* gave him priority over *Bailey*—this summons to vary the certificate by making *Dobson's* charge rank as against the share of *Mortimer Pinnock* after that of *Bailey*, was taken out on behalf of *Bailey*. The result of so varying the certificate would be to compel *Dobson* to resort to the share of *Mary Adela Pinnock*.

Warmington, Q.C., in support of the summons :—

In general priority among incumbrancers is determined by priority of notice given to the trustees, but when the funds charged have been brought into Court in a suit, and are no longer under the control of the trustees, then a stop order is substituted for notice to the trustees, and must be obtained by any one who has a charge and wishes to secure his priority: *Elder* v. *Maclean* (2); *Bridge* v. *Beadon* (3); the Court being really the trustee of the funds when it has made any order concerning them: *Warburton* v. *Hill* (4). By obtaining a stop order, therefore, *Bailey* is entitled to priority over *Dobson*, who merely gave notice of his charge.

E. Ford, for *Mary Adela Pinnock*, *contrà* :—

In 1875, when notice of his charge was given to the trustees by *Dobson*, the Court had not in fact dealt with the fund, and *Warburton* v. *Hill* shews that until the Court has disposed of the funds paid into Court, the trustee continues trustee; and notice to him is good without obtaining a stop order on the fund: *Thompson* v. *Tomkins*. By giving notice to the trustees before *Bailey* obtained his stop order, *Dobson* did all that was necessary to obtain priority.

Sturges, and *G. E. S. Fryer*, for other parties.

BACON, V.C., said that so long as the fund was in the hands of the trustees, notice to them was sufficient. But when by

(1) 2 Dr. & Sm. 8.
(2) 3 Jur. (N.S.) 283.
(3) Law Rep. 3 Eq. 664.
(4) Kay, 470.

payment of the fund into Court the office of the trustees was suspended, and the Court took upon itself the trusteeship of the fund, a stop order was the most effectual mode of perfecting the security, and in this case *Bailey*, whose security was first in point of date, and who, by obtaining a stop order, had been the first to perfect his security, was entitled to rank in priority over *Dobson*, who had not obtained a stop order, but had merely given notice of his charge to the trustees.

Solicitors: *James, Son, & James; Lee, Ockerby, & Everington.*

F. G. A. W.

KAY, J.

1883

April 7, 14.

In re WATSON, KIPLING, & Co.

Company in Liquidation—Occupation of Premises by Liquidator—Poor's and Local Board of Health Rates—Summons for Payment in full dismissed.

Where the occupation by the liquidator of the property of a company in liquidation had not been beneficial, an application for payment in full of poor's rates and Local Board of Health rates made after the liquidation commenced was refused.

THIS was a summons taken out in the liquidation of *Watson, Kipling, & Co., Limited*, by the two overseers of the poor for the parish of *Dawdon*, in the county of *Durham*, and by the Local Board of Health for the district of *Dawdon*, the overseers asking that the official liquidator of the company might be ordered to pay the sum of £31 17*s.* 2*d.*, the amount of two poor's rates assessed on the chemical works, blast furnaces, and cottages, and the local board asking for payment of the sum of £74 15*s.* 11*d.*, the amount of three district rates assessed on the chemical works, blast furnaces, a quarry, and workmen's cottages, all the property of the company.

The overseers deposed that before and at the commencement of the winding-up, which was at first voluntary, on a resolution passed by the company in June, 1881, the company was in possession and occupation of the property, chemical works, including blast furnaces, and premises, and that the same had since been in the possession and occupation of the liquidator.

On the 5th of May, 1882, a poor's rate was made on the property amounting to £24 2*s.* 4*d.*, the chemical works being rated at £1000 and the blast furnaces (previously rated at £667) being rated at £110, because they were not used for manufacturing purposes, but some of the buildings being used as a storehouse for engines, machinery, and other valuable chattels and plant, and a quarry and some cottages being rated at £66.

On the 13th of October, 1882, another poor's rate affecting the same property (excepting the quarry), amounting to £7 14*s.* 10*d.*, was made; the blast furnaces and cottages being assessed at the same rateable valuation as previously; the chemical works,

formerly assessed at £1000, being assessed at the reduced sum of £167, on account of the works not being used for manufacturing purposes, but occupied and used only as a storehouse for valuable plant, fixtures, machinery, and chattels necessary for the production and manufacture of goods made at chemical works. It was also proved that there had been no appeal against the assessments of the properties, and that the sums were due.

The clerk of the Local Board of Health deposed that a district rate was made on the 25th of October, 1881, on the poor's rate assessment of the properties, and that it amounted to £28 16*s.* 6*d.*; that another district rate was made on the 25th of April, 1882, on the poor's rate assessment, and that it amounted to £38 8*s.* 8*d.*; and that another district rate was made on the 31st of October, 1882, on the poor's rate assessment, and that it amounted to £7 10*s.* 9*d.*

The liquidation came under the supervision of the Court by an order made in September, 1881. The liquidator appointed at the meeting of the company in June, 1881, deposed that the blast furnaces were not being worked for any manufacturing purposes at the time of his appointment, nor had they since been used or made productive in any way. The chemical works ceased operations on the 5th of October, 1881, and had not since been beneficial in any way. All the stock-in-trade and moveables in and about the works were before the 15th of October, 1882, removed for safe custody into a warehouse at *Seaham Harbour*, for which rent was paid. Three of the cottages had been let at small weekly rents, the rest had not been let. It was the custom of the assessment committee of the union to assess property not in use at one-tenth of the amount of the assessment which was made when in operation. Some part of the property was still used by the liquidator as a storehouse for the machinery plant and fixtures. It was alleged that the property was worth about £5000. Sixteen furnace fires had always been kept up, and some men had been employed to do certain duties in the hope and expectation that the property would be sold as a going concern. He further stated the assessments of the properties for the poor's rate as set forth above, and that the whole of the property, which was freehold, was in 1882 offered for sale, and a purchaser agreed to give £23,000

KAY, J.
1883
In re WATSON, KIPLING, & Co.

for it, and paid £2300 as a deposit, but he refused to complete the purchase, and the deposit money had been retained by way of forfeit. There was no power of disclaiming the property, and it was not denied that the company had remained in possession of the property.

Northmore Lawrence, for the summons:—

There is no case in which it has been directly decided that property assessed by the parish authorities, and occupied by the liquidator of a company for the purpose of winding up the business of the company, is liable for poor's and other rates made after the commencement of the liquidation; but it is submitted that as this company's works and premises, or some of them, have been used by the liquidator for storage purposes, and as some of the furnaces have been kept alight and men employed with a view to a better sale of the whole property as a going concern it must be considered that the liquidator has had a beneficial possession. Rates made before the winding-up and covering a period before and after the winding-up cannot be apportioned: *In re Wearmouth Crown Glass Company* (1); and under the circumstances of this case, the occupation of the company having been before and after the winding-up, these rates should be ordered to be paid in full. If there were any objections to the assessment there should have been an appeal against it to the quarter sessions, after giving the usual notice: *Reg.* v. *Justices of Wiltshire* (2). It cannot be contended on this summons that the rates were not properly made. This is a case in which the landlord would have been allowed to distrain for the rent due to him: *In re Lundy Granite Company* (3); *In re Oak Pits Colliery Company* (4); and it is submitted that there is no real distinction in principle between rent and rates. The case most like the present is *In re West Hartlepool Iron Company* (5), in which an application for the payment of highway and improvement rates was refused on the ground that there had been no beneficial enjoyment by the liquidator, but the language of Vice-Chancellor

(1) 19 Ch. D. 640.
(2) 4 Q. B. D. 326.
(3) Law Rep. 6 Ch. 462.
(4) 21 Ch. D. 322.
(5) 34 L. T. (N.S.) 568.

Bacon shews that the application would have been allowed if there had been such an enjoyment as the liquidator has had in this case, and it must be borne in mind that his occupation has been that of the company.

Rigby, Q.C., and *W. W. Cooper*, for the liquidator:—

The simple question is, whether these rates should be paid in full out of the assets of the company in liquidation. The Court has to exercise a judicial discretion whether the parochial authorities, or any other, should be allowed to take proceedings to recover payment of the rates. All the circumstances being looked at, it will be seen that there has really been no beneficial occupation by the liquidator of this property, not such an occupation as would entitle the parish authorities to have leave to distrain for the rates; or to an order for payment of them in full. Rates are not analogous to rent. A landlord is allowed to distrain for rent which has accrued due after the winding-up, because it is considered inequitable that he should be kept out of possession of his property without being paid the rent. Therefore, though his legal right to do so has been taken away by sect. 163 of the *Companies Act*, 1862, the Court will exercise a discretion in his favour, and allow him to distrain. There is no such equity in the parish authorities to have the rates paid in full, or at all, as they are not kept out of possession of any property. As to them the question is, have they made out a case which will justify the Court, in exercising a discretion in their favour, to allow them to enforce payment of the rates to the detriment of the other creditors of the company. It has not been shewn that the occupation of the liquidator has been beneficial. The evidence proves entirely the contrary. He has derived no benefit in the way of profit of any kind from the works and premises, and therefore the occupation has not been one which gives a right to demand any rate at all: *Staley* v. *Overseers of Castleton* (1); *Harter* v. *Overseers of Salford* (2). Whether the rates have been legally assessed is not the question, but whether there should be payment in full. If, however, it be shewn, as it can be, that the assessment is unconscionable, and that the amount of rates asked for is excessive, the

(1) 5 B. & S. 505. (2) 6 B. & S. 591.

KAY, J.
1883
In re WATSON, KIPLING, & Co.

Court will not, in the exercise of its discretion, assist the applicants, and without leave under the *Companies Act* of 1862 they are without any remedy. There has been not only no beneficial occupation, but the keeping furnaces alight has necessarily been an onerous and expensive occupation. The sum at which the chemical works were assessed, they not being in operation, was excessive. The liquidator is under the protection of the statute. There is no reason why the applicants should not prove their debts, and be paid dividends. A rate made prior to the winding-up has no priority of payment over other debts: *In re Albion Steel and Wire Company* (1). As the applicants have asked to be paid the rates in full, they must shew their equity, and that they have not done; therefore the summons should be dismissed.

Northmore Lawrence, in reply:—

These rates, which were made after the winding-up, were to provide for the maintenance of the poor and for municipal purposes, and as the liquidator retained possession of the works for the purpose of realizing a sum of money for them, the applicants, as representatives of the ratepayers, ought to be put in the same position as if they were landlords of the property, who would have liberty granted to them to distrain for the full amount: *In re North Yorkshire Iron Company* (2). The cases of *Staley* v. *Overseers of Castleton* (3) and *Harter* v. *Overseers of Salford* (4), clearly shew that the property of the company having been used for storing the machinery, plant, and other moveables, was properly assessable, and the rates having been legally fixed and no objection taken at the proper time, the Court will not look at the quantum of rates, but say as the liquidator did not appeal against the assessment and kept possession for the convenience of the winding-up of the affairs of the company, that the rates should be paid in full.

KAY, J.:—

It seems very strange that this question, after so many years during which liquidations of companies have been going on, has not been decided by any Court. The subject is indeed almost

(1) 7 Ch. D. 547.
(2) Ibid. 661.
(3) 5 B. & S. 505.
(4) 6 B. & S. 591.

bare of authority. The application is made by persons—the parish authorities—who would be entitled to distrain for rates, and by their summons they ask that certain rates which were made since the company was ordered to be wound up shall be paid in full. Practically, I suppose, a better form of summons would be that the applicants should be allowed to distrain. It is not, however, intended to make them go through the actual process of distraining, but the Court is asked simply to direct that the rates shall be paid. [His Lordship, after stating the material dates and facts, continued:—] The first question which has arisen is whether the occupation by the company since the rates were made has been such a beneficial occupation of the property as entitles the persons who claim the rates to have them paid in full. Under sect. 163 of the *Companies Act*, 1862, no distress or any proceedings at law can be taken by those who claim to be paid rates. If any were taken they would be, in the language of the section, "void to all intents;" but notwithstanding the section the Courts have frequently, under sects. 85 and 87, reading them together with sect. 163, assumed power to give leave to a landlord, who wanted to be paid his rent, and to persons who wanted to be paid their rates, to distrain, and recover the rent or rates in full: a proper case being made out. As I have said, the question is whether, in this case, there has been such a beneficial occupation and enjoyment of the property as to induce the Court, in the exercise of its discretionary jurisdiction, to order these rates to be paid in full. The only authority which is directly in point is the case of *In re West Hartlepool Iron Company* (1). In that case a similar application was refused. Vice-Chancellor *Bacon*, before whom the case came, said that he was informed by Mr. *Buckley* that it was a case of first impression, and he used this language (2): "I am a little struck by the observation that the liquidators should stay in the occupation of rateable property without paying the rates. There is a clause giving the Commissioners a right to distrain for their rates. What the Court has done with reference to the right of distress has been to exercise a sort of discretion upon it, always preserving the lawful right of a landlord to distrain. One cannot find it in the Act, or within the

(1) 34 L. T. (N.S.) 568. (2) 34 L. T. (N.S.) 569.

KAY, J.
1883
In re WATSON, KIPLING, & Co.

limits of common sense, that because the company is wound up therefore the liquidators can remain in occupation without payment of rates, perhaps without payment of rent. The question ought to be considered and settled." The Vice-Chancellor then referred the case for further consideration, in order that counsel might see whether any authority could be found; and when it came on upon a future day he said this (1): "Common sense and common honesty ought to help me to decide this question. I hope it will be taken elsewhere. It seems that the possession of the liquidators is merely possession and occupation, but not enjoyment, and that, I think, is not the occupation intended by the Act. All I can do is to dismiss this summons without costs, leaving it to the Commissioners to carry in such proof in the winding-up as they may be entitled to." Now I gather from the language of the Vice-Chancellor that he, after a very deliberate consideration of the matter, came to the conclusion that in order to entitle the claimants to have the rates paid in full they must make out not only possession and occupation, but enjoyment, so that possession only would not do, and occupation only would not do; but there must be something which the Vice-Chancellor defined, if his language be correctly reported, by the name of enjoyment. As regards the circumstances which make manufacturing property rateable, two cases have been cited, viz., *Staley* v. *Overseers of Castleton* (2) and *Harter* v. *Overseers of Salford* (3), from which it seems that there may be a rateable occupation of manufacturing premises although manufacturing is not being carried on, and probably such an occupation as the company had here after the winding-up might be an occupation which would subject them to a certain amount of rates, but that does not seem to conclude the question whether the Court ought to allow the rates to be paid in full. Mr. *Northmore Lawrence* argued that where a liability is incurred during the winding-up, that liability ought to be paid in full, and therefore these rates ought to be paid in full because they were made during the winding-up; but I do not think I ought to accept that view of the matter. The question is, whether the liability so incurred ought to be paid in preference

(1) 34 L. T. (N.S.) 570. (2) 5 B. & S. 505.
(3) 6 B. & S. 591.

to other claims in the winding-up—to be paid in full before the claims of other creditors. It seems to me that the reasonable way for the Court to exercise its discretion is to have regard to all the circumstances of the case, and to see whether, under all the circumstances, the rates claimed are such rates as ought to be paid in full in priority to the claims of other creditors. In the first place, I am not satisfied that the question of the payment of rates should be determined on absolutely the same principle as that of the payment of rent due to a landlord, because there is this difference, as was pointed out by Mr. *Rigby*, and I agree that it is a substantial distinction; in the case of a landlord the company occupying his property are keeping him out of possession, and if the company have, and deliberately exercise, enjoyment of the property of the landlord, no doubt the rent ought to be paid in full.

The language of Lord Justice *Lindley* in the case of *In re Oak Pits Colliery Company* (1) when he was expressing what seems to have been the judgment of the full Court, puts the cases in which the landlord ought to recover his rent in full accrued due after the winding-up in this way: "If the liquidator has retained possession for the purposes of the winding-up, or if he has used the property for carrying on the company's business, or has kept the property in order to sell it or do the best he can with it, the landlord will be allowed to distrain for rent which has become due since the winding-up; but if he has kept possession by arrangement with the landlord, and for his benefit as well as for the benefit of the company, and there is no agreement with the liquidator that he shall pay rent, the landlord is not allowed to distrain. When the liquidator retains the property for the purpose of advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt contracted for the purpose of winding-up the company, and ought to be paid in full like any other debt or expense properly incurred by the liquidator for the same purpose, and in such a case it appears to us that the rent for the whole period during which the property is so retained or used, ought to be paid in full without reference to the amount which could be

(1) 21 Ch. D. 330.

KAY, J.
1883
In re WATSON, KIPLING, & Co.

realized by a distress." But every word of that refers to property which is only the property of the company *sub modo*, that is subject to the company paying rent to the landlord, and it is because of their possession as against the landlord of the property to which possession in law they are not entitled, except on the terms of paying rent, that that language is used by the learned Judge. Now not a word of that language applies in any way to the payment of rates. As to rates there is no possession of any property which is held from the persons who claim payment of the rates *sub modo* in any way, and these rules which have been laid down in the case of a landlord do not at all apply, but even in the case of a landlord the Lord Justice *Lindley* went on to say, (1) "but no authority has yet gone the length of deciding that a landlord is entitled to distrain for, or be paid in full rent accruing since the commencement of the winding-up where the liquidator has done nothing except abstain from trying to get rid of the property which the company holds as lessee." For the reasons which I have given it does not appear to me that the same rule necessarily applies to the case of a landlord, and to that of persons claiming to be paid rates. What rule then should be applied to persons claiming to be paid rates? According to the language of Vice-Chancellor *Bacon* in the case of *In re West Hartlepool Iron Company* (2), which I have read, in order to entitle claimants to have rates paid in full the possession must not be mere possession nor mere occupation, but something in the nature of enjoyment. Now suppose a liquidator is carrying on a business for the purpose of a more beneficial sale of it as a going concern. That would, as it seems to me, be a case in which the rates might be ordered to be paid in full, because they might be treated as part of the outgoings payable in respect of the business so carried on by the liquidator acting for the benefit of the company. But there is nothing of that kind here; and what was said on the part of the liquidator in this case was that the only possession which the company has had since the rates in question were made was a possession which has been in no sense enjoyment, but a possession which has been onerous as it has involved the company in expenses and liabilities for keeping the

(1) 21 Ch. D. 331. (2) 34 L. T. (N.S.) 570.

furnaces alight and in doing other things without any kind of profitable return. The liquidator acting for the company has made no profit, nor attempted to make any, therefore his possession has not been in that sense a beneficial occupation. It is true that it has been profitable to this extent, that it prevented the necessity of paying rent for warehousing certain of the goods and other property of the company elsewhere—they having been, as stated, warehoused in the company's buildings free from the payment of any rent. That is the only sense in which the company has had a beneficial occupation of the property. Will it then under these circumstances be equitable, and that is what the Court has to consider when asked to give this leave,—that these rates should be paid in full to the detriment of other creditors of the company? If there had been profits made I could see a reason why the rates should be paid in full, but no profits have been made whatever. The only argument which could be used, was that if these portions of the property of the company had been stored elsewhere, some rent must have been paid. How much rent would have to be paid I do not know, nor what amount of storage would be wanted. Would the rent amount to as much as the rates? Looking at all the circumstances, I am not satisfied that there has been such a beneficial enjoyment by the liquidator as to make it equitable or right that I should order these rates to be paid in full.

But the case does not stop there. At different dates beginning in October, 1881, after the works were all stopped, some of these rates were made upon the footing of the company's business being a going concern, *i.e.*, the premises were rated at £1000 a year. It was said that the liquidator might have appealed against the assessment, and have got it reduced; that he had chosen not to appeal, and that as the time had gone by for that purpose they were proper rates fixed by law; and therefore the Court should have no regard to the amounts at all, but should order them to be paid in full; but would that be equitable as between the persons claiming to be paid the rates, and the other creditors of the company? It seems to me that such an order would be most inequitable as against the other creditors. And sitting in the Chancery Division can a Judge who has to exercise a judicial discretion,

KAY, J.
1883
In re WATSON, KIPLING, & Co.

leave out of sight the fact that some of the rates were extravagantly large, and that if the liquidator had appealed against the assessment it must have been reduced? I cannot leave all this out of sight. The applicants have not said that the liquidator failed in his duty in not getting the assessment reduced, but they have asked me in the exercise of my discretion to say that the rates should be paid in full. It is a sufficient answer to say that it would not be equitable to allow rates of that amount to be paid in full. Even if there had been default on the part of the liquidator, are the rating authorities entitled to be paid in full rates upon an assessment which it would not be possible to maintain if there were an appeal against it? It is true that that observation does not apply to all the rates, for as regards some part of the property there was a large reduction obtained by the liquidator in the assessment, and therefore the rates were made on a different footing, and they are of a much smaller amount, but I may say that I am not sure that any of the rates have been made on a scale which is really just and equitable. By the *Companies Act* of 1862, the right of distraint is absolutely taken away, and if I am asked to restore that right, I ought to feel satisfied that the rates have been assessed in an equitable manner. I think, therefore, for that reason also I ought not in the exercise of my discretion to accede to this application; but if I am right in my view on the first point, this point would hardly arise. Upon the whole I am of opinion that this is not a case in which the Court ought to treat the company, as having such an occupation of the property as that these rates should be ordered to be paid in full; the summons therefore must be dismissed.

Solicitors: *Maples, Teesdale, & Co.*, agents for *H. B. Wright, Seaham Harbour; J. J. and C. J. Allen*, agents for *Heap & Molesworth, Rochdale.*

T. F. M.

In re DRONFIELD SILKSTONE COAL COMPANY (No. 2). CHITTY, J.

1883
Feb. 27.

Company—Winding-up—Liquidator — Remuneration — Costs of Realization— General Costs—Insufficiency of Assets—Priority—Internal Litigation.

Where the assets of a company in compulsory liquidation are insufficient for payment of the costs of the winding-up, the official liquidator is not entitled to any remuneration.

Where in the compulsory winding-up of a company the assets are insufficient for the payment in full of costs, the costs of realization are payable out of the assets in priority to costs incurred in internal litigation, and these latter costs, including those of the liquidator, are payable rateably, without regard to priority in the dates of the orders under which such costs have been directed to be paid.

Ex parte Percival (1), *Cape Breton Company* v. *Fenn* (2), and *In re Home Investment Society* (3) considered.

ADJOURNED SUMMONS.

This was a summons taken out by the official liquidator of the *Dronfield Silkstone Coal Company, Limited* (which was in course of winding-up under an order made in 1879), that the assets of the company might be applied, according to the course of the Court, in payment of the costs, charges, and expenses incurred in the winding-up, and in payment of such dividend as they might be sufficient to answer upon the debts incurred in the winding-up, and that the costs of that application might be costs in the winding-up.

The existing assets of the company being insufficient for payment in full of the liquidator's costs and remuneration, and the costs of certain litigation in the winding-up, questions of priority arose, the circumstances which led to the present application being shortly as follows:—

By an order in the winding-up made in Chambers on the 23rd of March, 1880, on a summons by Messrs. *Overend & Barker*, mortgagees of the company's colliery comprised in a certain lease, it was ordered "that the official liquidator should out of the assets pay to the applicants the rents under the lease, and that the costs of the applicants of this application, and of the

(1) Law Rep. 6 Eq. 519. (2) 17 Ch. D. 198.
(3) 14 Ch. D. 167.

CHITTY, J.

1883

In re DRONFIELD SILKSTONE COAL COMPANY (No. 2).

summons taken out on behalf of the said official liquidator on the 19th of March, 1880, ascertained at the sum of £28 2*s.* 3*d.*, and the costs of the *Sheffield and Rotherham Joint Stock Banking Company*, and the said summons of the 19th of March, 1880, ascertained at the sum of £2 18*s.* 10*d.*, be paid by the official liquidator out of the assets of the said company, and that the costs of the said official liquidator of both the said applications be costs in this matter."

By another order in the winding-up made on the 8th of April, 1880, upon a summons by the official liquidator for the delivery up, on the ground of fraudulent preference, of certain securities held by the *Sheffield and Rotherham Banking Company* as equitable mortgagees of the company's property, no order was made on the application except "that the official liquidator do out of the assets of the above-named company pay and retain the costs of the said applicant and of the said Respondents of the said application, such costs to be taxed by the Taxing Master." One *Wake*, a director of the company, was joined with the bank as a Respondent to that application.

By an order of the Court of Appeal made on the 21st of December, 1880, upon an appeal motion by one *Frederick Ward*, who had been settled on the list of contributories of the company under an order made by Sir *G. Jessel*, M.R., on the 10th of April, 1880, that order was reversed by declaring that *Ward* was not a contributory (1), and it was ordered "that the said *Dronfield Silkstone Coal Company, Limited*, do pay to the said *Frederick Ward* his costs of the said order dated the 10th of April, 1880, and of this motion, such costs to be taxed by the Taxing Master."

Ward's costs were taxed at £172 11*s.* 6*d.*, and were paid by the liquidator out of the assets in June, 1881.

The net assets of the company got in by the liquidator and now available in the winding-up, were represented by a sum of about £2200. This sum was liable to be reduced considerably below £2000 for preferential debts, such as taxes, rent of pumping-engine, &c., leaving a balance insufficient for payment in full of costs and liquidator's remuneration.

(1) See *In re Dronfield Silkstone Coal Company*, 17 Ch. D. 76.

The liquidator's claim for costs and remuneration consisted of the following particulars:—

His estimated costs, as yet untaxed, incurred in the realization and winding-up, exclusive of his costs under the orders of the 23rd of March, 1880, and the 8th of April, 1880, were about £1100; his estimated costs, of which the greater part was yet untaxed, of the several summonses in *Overend & Barker's Case*, the *Sheffield and Rotherham Bank* and *Wake's Case*, and *Ward's Case*, amounted to about £500; and his estimated remuneration was about £650.

The two sums of £28 2*s.* 3*d.* and £2 18*s.* 10*d.* directed to be paid for costs by the order on *Overend & Barker's* summons had not yet been paid by the liquidator.

The costs of the *Sheffield and Rotherham Bank* on the liquidator's summons against them had been taxed at £191 4*s.* 6*d.*, and the costs of *Wake* on the same summons had been taxed at £166 15*s.* 1*d.*, and neither of these sums had yet been paid.

From the liquidator's affidavit filed upon the present summons it appeared that he considered the effect of the order of the Court of Appeal in *Ward's Case* was to render the costs of the appeal and of the trial in the Court below payable by him (the liquidator) "personally;" and throughout the hearing of the present summons he was treated as being under that personal liability, and therefore liable to recoup to the assets the £172 11*s.* 6*d.* he had paid out of them for *Ward's* costs.

The liquidator now disclaimed at the bar any priority for his remuneration, but even after deducting the amount claimed for remuneration the available assets were barely, if at all, sufficient for payment in full of the several costs above-mentioned.

Romer, Q.C., and *Burton Buckley*, for the liquidator:—

Having regard to the insufficiency of the assets for payment of costs, we admit that, upon the authority of *In re Massey* (1), we cannot make any claim for remuneration. The question is therefore confined to costs alone, and we submit that the established rule is that the liquidator is entitled to his costs of realization in the winding-up in priority to the other costs in the liquidation:

(1) Law Rep. 9 Eq. 367.

CHITTY, J. 1883 *In re* DRONFIELD SILKSTONE COAL COMPANY (No. 2).

In re Oriental Hotels Company (1); *Ex parte Grissell* (2). Then as regards the costs incurred and payable by the liquidator under the several applications in the winding-up, those are entitled to rank rateably with the costs of the other parties irrespective of the dates of the several orders: *Ex parte Percival* (3); *Cape Breton Company* v. *Fenn* (4).

[HIS LORDSHIP having sent for the order in *In re Marlborough Club* (5), with reference to which the application was made in *Ex parte Percival*, it was found that the order directed the taxed costs of the applicant (the official liquidator) and of the other parties "to be paid by the official liquidator out of the assets of the company" (6).]

Ince, Q.C., and *Gould*, for the *Sheffield and Rotherham Bank*, and for *Overend & Barker*:—

We admit that the liquidator's costs of realisation must rank first, but we contend that as regards our costs ordered to be paid under the order of the 23rd of March, 1880, they are, according to the terms of that order, payable in priority to the liquidator's costs of litigation. Then, with regard to the bank's costs of the liquidator's application of the 8th of April, 1880, that application having been unsuccessful, our costs must rank prior to his. It is settled that in external litigation between a company in liquidation and outsiders, the company must be dealt with, as a matter of course, like any other litigant, and, therefore, if the company is unsuccessful in bringing or defending an action, the successful litigant is entitled to an order for payment of his costs, and those costs are payable in priority to the other costs in the liquidation: *Bailey & Leetham's Case* (7); *Ex parte Smith* (8); *Madrid Bank* v. *Pelly* (9); *In re Home Investment Society* (10). Moreover, in such cases the practice is to make the order for payment of the costs of the successful litigant against the liquidator personally, without taking into consideration the question whether he can get them

(1) Law Rep. 12 Eq. 126.
(2) 3 Ch. D. 411.
(3) Law Rep. 6 Eq. 519.
(4) 17 Ch. D. 198.
(5) Law Rep. 5 Eq. 365.
(6) Chan. Ord. 1868, R. 1093.
(7) Law Rep. 8 Eq. 94.
(8) Ibid. 3 Ch. 125.
(9) Ibid. 7 Eq. 442.
(10) 14 Ch. D. 167.

out of the assets: *Ferrao's Case* (1). We submit that the rules so established by the authorities referred to in the case of external litigation should be applied also to internal litigation, such as that in the present case. But assuming that the costs of the several applications can be charged upon the assets only, we submit that they should be paid according to the priorities in date of the orders. The observations of the late Master of the Rolls in *Cape Breton Company* v. *Fenn* (2) are merely a *dictum*. At all events the liquidator must be postponed in respect of his costs in *Ward's Case*, for there has been no order for payment of them.

Kenyon Parker, for *Wake*:—

The rules applicable to trustees in an administration action are applicable in this case. If in external litigation the liquidator is the attacking party, and is unsuccessful, he is ordered to pay costs. Again, if an outsider attacks the liquidator and is successful, and obtains an order for payment of his costs, then the litigant is entitled to have his costs paid in full by the liquidator personally. Similarly, in internal litigation, if the litigant is attacked by the liquidator and is successful, he should be entitled to an order against the liquidator personally. But if the litigant chooses, or is compelled to avail himself of the machinery of the winding-up for the purpose of enforcing payment of his debt, and is successful, his costs will be added to his debt, and he can consequently only prove for them in the liquidation.

The rule laid down in *Ferrao's Case*, by which the costs of a liquidator's unsuccessful litigation in a winding-up are thrown upon him personally, is similar to that in bankruptcy: *In re Angerstein* (3).

Romer, in reply:—

With regard to the liquidator's costs in *Ward's Case*, I submit that the Court has jurisdiction now to make an order for their payment, and that as there has been no misconduct on the part of the liquidator, he is clearly entitled to have them out of the

(1) Law Rep. 9 Ch. 355. (2) 17 Ch. D. 205.
(3) Law Rep. 9 Ch. 479.

CHITTY, J.
1883
In re DRONFIELD SILKSTONE COAL COMPANY (No. 2).

assets. Then, according to the rule that the priority in date of orders made as to costs in a liquidation gives no priority as between the several sets of costs, the liquidator's costs in *Ward's Case*, if now ordered to be paid, will rank rateably with the other sets of costs.

CHITTY, J.:—

In this case there is a fund of about £2000 in the shape of assets in the hands of the liquidator, but it is agreed upon all hands that the result of the liquidation has been so unfortunate that this fund, so far as it is applicable for costs, is barely, if at all, sufficient for payment of all the costs that would rightly fall upon it, and the questions raised before me are with reference to the priority of the various costs.

I will mention at the outset that the liquidator does not claim any priority for his remuneration. In fact, he admits on the authorities, that his remuneration must be postponed to the payment of costs. It is unnecessary, therefore, to deal with that question.

The fund has been realized by the efforts of the official liquidator, who is the officer appointed by the Court for the purpose of assisting the Court in getting in the assets, and it appears to be unquestionable that there can be no fund properly speaking out of which you can pay any costs until you have paid the costs of getting that fund in. I hold, therefore, that the costs which ought first in the order of priority to be paid out of the fund are the costs of the liquidator, properly incurred in getting in and realizing the assets.

It is said that the amount of costs in the case is very large. I know not whether it will turn out to be large or not, because that is a question for the Taxing Master. Again, the costs payable out of the fund are only such costs as have been properly incurred. I know that official liquidators are attacked sometimes justly and sometimes unjustly about the costs of liquidations, but it is forgotten that the real cause of expense is very often this, that persons who ought to pay and contribute to the assets, use every means within their power to avoid and postpone the payment, the result being that costs are often very much increased by the steps

that the liquidator necessarily, in pursuance of his duty, is bound to take in order to get the assets in. The costs of realizing and getting in the assets are larger proportionately where the persons who have to pay and contribute to the estate are numerous than where they are few in number, because the demands instead of being confined to a few persons are spread over a great many.

The next point is this. Certain orders have been made in the proceedings which I will proceed to state. They stand in one respect upon the same footing, though there is some little difference in the language. The liquidator instituted in the liquidation what may be called internal litigation against certain parties, one being the *Sheffield and Rotherham Bank*, who held a security from the company which he attacked. The other litigation was in the case of *Overend & Barker*, who were claimants for rent against the company. In the *Sheffield and Rotherham Bank Case*, to which Mr. *Wake* was also a party (and there is no distinction so far as this matter is concerned between Mr. *Wake* and the Bank), the order was that the liquidator "do out of the assets of the above-named company pay and retain the costs of the said applicant and of the respondents of the said application, such costs to be taxed;" the costs being the costs of the application. That is to say, there is an order of the Court that both the costs of the liquidator and the adverse party shall be paid out of the assets.

The order in *Overend & Barker's Case*, which also relates to the *Sheffield and Rotherham Bank*, is very much to the same effect.

That order, which was made in Chambers, is that the costs of the adverse parties of that application, and also of another application mentioned in the body of the order, all of which costs were ascertained at certain fixed sums, be paid by the official liquidator out of the assets of the company, and that the costs of the official liquidator himself of both the applications be costs in the matter.

But it is said that the right mode of dealing with these orders is to construe them in this way—that a preference and a priority which is not mentioned on the face of them, is given to the adverse party. The principle, it is asserted, is this, that for all purposes the liquidator is treated as an adverse litigant, and that

CHITTY, J. 1883 *In re* DRONFIELD SILKSTONE COAL COMPANY (No. 2).

if he fails he must pay costs, and that the fund which he can have recourse to is a fund merely for the purposes of indemnity, and nothing more. I entertain not the slightest doubt that the Court, whether the Court of first instance, or the Court of Appeal, has, in every case, jurisdiction to order the official liquidator personally to pay the costs. The practice in the Court of Appeal has been to order him personally to pay the costs. That has been really put upon two grounds, the first being that he is an adverse litigant, and the second, which is perhaps the minor ground, that the Court of Appeal is not the Court which superintends the liquidation. That is to say, it is left to the Judge, to whose Court the liquidation is attached, to deal with the costs as he may be advised. But I think it is an established practice that the order of the Court must be read according to the ordinary meaning of its terms, and if this were the whole case, and there were nothing more in it, I should decide (and so far as this point is concerned, I do decide), that there is no priority given by any of these orders to the adverse litigant as against the liquidator, nor indeed any priority given to the liquidator as against the adverse litigant. Suppose I had only a fund of £200 to be dealt with, and there were no other costs but those of the litigation, and that the costs of the adverse parties were taxed at £200 and the costs of the liquidator at £200, I should not have the slightest doubt that the right mode of working out the order would be to pay the costs, according to the well-known principle of equity, rateably out of the fund; and I propose in this case, as far as those orders are concerned, to follow that principle.

But there are other points which have arisen; the Court of Appeal in *Ward's Case*, which was another case that arose in this liquidation, reversed the order of the late Master of the Rolls, the Judge of first instance, who had made an order adverse to Mr. *Ward* and favourable to the liquidator. The liquidator had, in fact, succeeded before the Master of the Rolls wholly. The Court of Appeal, however, reversed the decision of the Master of the Rolls, and ordered the *Dronfield Company* to pay Mr. *Ward's* costs, and there it stopped short, saying no more. It seems to have been admitted by the liquidator that under this order he was liable to pay these costs personally. If so, it is clear

Mr. *Ward* has no right to be paid out of the fund, but he gets these costs paid to him by the liquidator, leaving the liquidator to take his chance of being paid out of the assets the costs which he, the liquidator, has himself incurred, and the costs paid by him to Mr. *Ward*.

A point has been argued before me with reference to the dates of the orders. I take it now to be established that, where in the course of a liquidation various orders are from time to time made for payment of costs out of the assets, no priority on account of date is given to the various persons in whose favour (whether it be liquidator or claimant, or otherwise) these orders are made. That was the decision of Lord *Romilly*, Master of the Rolls, in the case of *Ex parte Percival* (1). I have sent for the order in *In re Marlborough Club* (2) upon which Mr. *Percival's* application was made, and I find it was an order under which the liquidator was to pay and retain both Mr. *Percival's* and his own costs out of the assets. The Master of the Rolls held in *Ex parte Percival* that the dates of orders for payment of costs did not give priority, and, as far as my experience goes, that rule has never been questioned.

In the case of the *Cape Breton Company* v. *Fenn* (3) the late Master of the Rolls stated his view of the practice (and he had a large experience in these matters) in this way. He says (4), "A Mr. *Rooney* had petitioned in the winding-up to remove the liquidators. Upon that application an order was made that Mr. *Rooney's* costs should be paid to him out of the assets of the company. It is well known that such an order does not create a charge upon the assets; it limits the right of the person in whose favour it is made to payment out of the assets, but it does not create a charge upon them. If it did, the persons in whose favour such orders were made would have priority according to the dates of their orders; but that is not so. In many cases the liquidator has priority over all these orders even for subsequent costs. The order does not create a charge upon the assets, but gives a right to get paid out of the assets in a due course of administration, and nothing more, and this was the right given to the Petitioner."

(1) Law Rep. 6 Eq. 519.
(2) Ibid. 5 Eq. 365.
(3) 17 Ch. D. 198.
(4) Ibid. 205.

CHITTY, J.
1883
In re DRONFIELD SILKSTONE COAL COMPANY (No. 2).

But it is said that is a mere *dictum*. The point that the Master of the Rolls was dealing with, no doubt, was whether there was a charge created on the assets with reference to the question as to whether leave ought to be given to use the company's name in instituting certain proceedings; but whether it be a *dictum* or not, I take it to be a correct statement of the practice of the Court with reference to orders of this class.

In the case before me the liquidator has, up to the present moment, obtained no order for payment of his costs of his summons against *Ward*, and he now comes and asks for an order for payment of those costs out of the assets. If a liquidator who, as I have said, is the officer of the Court, was in the position of a trustee, he would be entitled, as every trustee is in an administration action when he has done his duty and conducted himself properly, to his costs in priority.

A trustee, if he is an adverse litigant, that is to say, if he commences an action against third parties, stands in the position of any ordinary litigant, and he cannot protect himself against costs by saying he is a trustee. If he wants an indemnity, he, as is well known, institutes proceedings for the administration of the trusts and then asks the Court for leave to bring or defend particular actions. The effect of that is that he is then allowed, whether he succeeds or fails, all the costs he has properly incurred in the external litigation.

For some purposes the liquidator is in the same position as the trustee; but the liquidator stands in a different position in this respect, that, as a rule, the trustee in an administration action, where he is well advised, does little or nothing actively. He generally remains passive: claims are brought in and he defends them, and he thus acts generally in a defensive character, and not on the offensive. But the official liquidator in a liquidation under the *Companies Acts* does not bring before the Court the various claims he proposes to make: he institutes the proceedings at his own risk. Generally speaking, if he is a prudent man, he first obtains the opinion of counsel. But if he desires to institute external litigation, that is to say, to bring an action, he cannot do that without first obtaining the sanction of the Court under the 95th section of the *Companies Act*, 1862. But in instituting

proceedings such as those in the present case, the liquidator does so entirely on his own motion and at his own risk.

I make these observations because I wish to state the case of both sides with the utmost fairness. It is not asked at the bar that the liquidator's costs, except the costs of realizing and getting in the assets, should have any precedence. So far I think his counsel are right in not asking to have him put in the position of a trustee in an action for executing or administering the trusts of the estate of which he is trustee; and for this reason, that the liquidator is, as I have already stated, an actor to a much greater extent than a trustee is, and he embarks in litigation with his opponents in the first instance at his own risk and without obtaining any leave. I mean, of course, when the litigation is what I have called internal—the *Companies Act*, 1862, having provided a scheme whereby substantially all questions in relation to the company under the winding-up can be decided in the winding-up itself.

But now there remains this question. Where the liquidator has not in any way misconducted himself, and he comes after special orders have been made as to costs, such as the orders of the 23rd of March and the 8th of April, 1880, which I have read, to ask for his costs of an application the order on which, as in *Ward's Case*, does not provide for his costs, ought he to be postponed in respect of these latter costs? I think not. The arguments I have heard on behalf of those who obtained the other orders, and who assert that the liquidator, as to the costs in respect of which he has obtained no order at present, ought to be postponed, seem to proceed on the footing that the liquidator had misconducted himself.

Now the first point I have to decide is whether there is anything in the special nature of the costs of which the liquidator now asks an order for payment which renders it equitable or just that in respect of those costs he should be postponed. I have said before that, with regard to the costs which have already been allowed him, he ought not to be postponed. As regards the case of Mr. *Ward*, a liquidator has a duty to discharge towards the various persons interested in the fund—creditors, contributories, and others—and in this case the liquidator in discharge of his

CHITTY, J. 1883 *In re* DRONFIELD SILKSTONE COAL COMPANY (No. 2).

duty instituted those proceedings against Mr. *Ward*, and was successful before the Master of the Rolls. I think it would be a harsh conclusion to say that the officer of the Court who has only done his duty, and who had so substantial a case to bring before the Court that he succeeded before the Master of the Rolls, ought not to be allowed his costs out of the fund. I think, therefore, that he ought to be allowed these costs. That is the first proposition. Then I think he ought not, in respect of these costs, to be postponed. I think I ought to make an order now for payment of them, but this order, although posterior to the other orders in point of date, will, according to the principle which, as I have endeavoured to explain, is to be derived from the judgments of Lord *Romilly*, and of the late Master of the Rolls in the cases to which I have referred, stand in the same position as the others. I think, therefore, the right order with regard to the liquidator's costs in that case, is to give him his costs out of the assets, subject of course to taxation.

Inasmuch as the assets are deficient the liquidator will only stand rateably with the other claimants in respect of all his costs; in which costs I include those he has incurred in *Ward's Case*, the costs he has paid, and any other costs which have not been specially brought to my attention. In other words, he is in the same position as if he had come, as he might have done, the day after Mr. *Ward's Case* had been decided, and had then asked for an order for payment of the costs in that case out of the assets. The Judge would then have considered whether they were proper or not, and I now think, in the exercise of my discretion, that if the matter had been brought before me I should have said, as I say now, that those costs were properly incurred. The order would then have been made some months ago, and I should have had before me three orders for payment of costs instead of two. I have already said I do not think I ought to draw any material distinction between the forms of the two special orders that have been made, the difference in the language being that, in the one case the order was for payment of the liquidator's own costs out of the fund, and in the other case the order was merely that his costs should be costs in the matter; but if there is any possible doubt as to the meaning of the order, I can remove it now by

making an order giving the liquidator his costs that were made costs in the matter, he being, in my opinion, entitled to them. Those costs, therefore, will now be ordered to be paid out of the fund.

The result therefore, is this, that the costs of realization and getting in will stand first. The costs which are ordered to be paid out of the assets will all stand next and share rateably. To avoid any misapprehension, I will now order the liquidator's costs which I have mentioned, namely, the costs he has paid to Mr. *Ward*, and the costs which he has incurred in Mr. *Ward's Case*, and the costs which were made costs in the matter by the order of the 23rd of March, 1880, and his general costs of the liquidation, to be paid out of the assets. But, inasmuch as the assets appear to be insufficient, then I put all the various claimants on the same footing, that is to say, they are to rank rateably; subject of course to the payment of those costs which I have said are to rank in priority, namely, the costs of realizing and getting in the assets.

In coming to this conclusion I consider I am acting consistently with all the authorities. I do not propose to go through them. In the course of my judgment I have stated as clearly as I can what my views are. In the principles I have adopted I do not think I have departed from those which Lord Justice *James* and Lord *Cairns* have laid down. They said the liquidator ought to be treated as an adverse litigant, but I think the Court must always look in each particular case to the orders which have been actually made. Of course, in the present case, if I thought it right to do so, I could make an order now which would postpone all the liquidator's costs, including his general costs, and including the costs which he has paid and incurred in *Ward's Case*, and the costs of the other cases, to the costs of the other claimants; but in my view of the matter, for the reasons I have endeavoured to state, that would not be proper. The costs of this application of all parties will stand upon the same footing.

It might seem a little disrespectful to Vice-Chancellor *Malins* if I did not mention the case of *In re Home Investment Society* (1).

(1) 14 Ch. D. 167.

CHITTY, J. 1883 *In re* DRONFIELD SILKSTONE COAL COMPANY (No. 2).

In that case the order was for the costs to be paid by the liquidator out of the assets. In his judgment the Vice-Chancellor states the terms of the order. There is no order there in favour of the liquidator, and the Vice-Chancellor—and I say it in all sincerity—was justified, no doubt, in the view which he took of the facts of the case, in saying that he would treat the liquidator as an adverse litigant. On the facts of the case before him he treated the liquidator as an adverse litigant who had made an unfounded claim, and who ought, therefore, to pay the costs personally as between himself and his adversary. Perhaps there are some words towards the end of the judgment, which may look as if the Vice-Chancellor were laying down a general principle, but I do not think, on reading the judgment fairly, that that was the Vice-Chancellor's intention. At the end of the judgment he says (1), "Mr. *Brabant* must be paid out of the assets all the costs to which he has been improperly put by adverse litigation, in priority over the official liquidator, who has entered into this litigation at his own peril, and the order will be as asked for." He was dealing with the particular case before him, and not with any general principle.

Solicitors: *Emmet, Sons, & Stubbs; Geare & Son*, for *B. Wake & Co., Sheffield.*

(1) 14 Ch. D. 170.

G. I. F. C.

In re ADAM'S POLICY TRUSTS.

CHITTY, J.

1883

April 23.

Policy of Insurance—Trust for Wife and Children—"Separate use"—Married Women's Property Act, 1870, *s.* 10—*Married Women's Property Act*, 1882, *s.* 11—*Form of Order.*

A husband effected a policy for the benefit of his wife and children under the *Married Women's Property Act*, 1870, and died insolvent. His wife and one child of the marriage pre-deceased him. Upon a petition by his surviving children, under the 10th section of the Act, for the appointment of a trustee of the policy-money and for a declaration as to the rights of the petitioners :—

Held, that the Court had, under that section, no jurisdiction to do more than make the order appointing a trustee; but since under the policy there was a trust either for the wife for life with remainder to the children, or, in the alternative, for the wife and children as joint tenants, the order was directed to be prefaced with an expression of opinion that the wife took no interest, and that the surviving children took as joint tenants.

In re Mellor's Policy Trusts (1) not followed.

Semble, a policy effected by a husband under sect. 10 of the *Married Women's Property Act*, 1870, "for the benefit of his wife and children," should be read in conjunction with that section, and should, by virtue of the words "separate use" in the section, be construed as giving the wife a life interest only, with remainder to the children.

By a policy of insurance of the *Scottish Provident Institution*, dated the 5th of April, 1874, after reciting that *David Adam*, being desirous of assuring his life under the provisions of the *Married Women's Property Act*, 1870, for the benefit of his wife *Anne Adam*, and the children of their marriage, had applied to be admitted a member of the said institution, and to become a contributor to its funds for the benefit thereinafter mentioned; and that the said *David Adam* had paid to the manager of the said institution the sum of £65 15*s.*, being his first annual contribution to its funds in respect of the benefit thereinafter mentioned, it was certified that, in consideration of the premises, the said *David Adam* had been duly admitted a member, and that under the provisions of the said *Married Women's Property Act* such trustee as might be appointed as provided in the said Act for the benefit of his said wife, *Anne Adam*, and of the children of their

(1) 6 Ch. D. 127; 7 Ch. D. 200.

CHITTY, J.

1883

In re ADAM'S POLICY TRUSTS.

marriage, and in the event of his said wife predeceasing him, and there being no children of the marriage surviving, then the heirs, executors, administrators or assigns of the said *David Adam*, should be entitled to receive out of the funds of the said institution at the end of six months after his decease the sum of £2000 sterling.

By a memorandum dated the 8th of April, 1878, annexed to the policy, the sum assured was declared to be restricted to £205 sterling.

Anne Adam predeceased her husband, *David Adam*. *David Adam* died intestate and insolvent on the 25th of July, 1882, having had eight children by his said wife, one of whom had predeceased him. It was not intended to take out administration to *David Adam's* estate.

This was a petition presented under the *Married Women's Property Act*, 1870, by the seven surviving children, three of whom were infants, for the appointment of one *William Butter* as trustee of the moneys payable under the policy; that the rights and interests of the petitioners in the said moneys might be declared, and that the trustee might be ordered to hold the moneys when received in trust for the children equally.

J. W. Baines, for the petitioners:—

The application is made under sect. 10 of the *Married Women's Property Act*, 1870, which expressly authorizes the Court to appoint a trustee of the money payable on a policy effected under that section. The question is whether the Court has also jurisdiction under that section to declare the rights of the parties interested in the fund and to direct its distribution.

I submit that *In re Mellor's Policy Trusts* (1) is a distinct authority that the Court has such jurisdiction, and that, reading the policy together with the 10th section, which says that a policy effected by a married man on his own life "and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed," the wife took an

(1) 6 Ch. D. 127; 7 Ch. D. 200.

interest for her life only, with remainder to her children; the introduction of the words "separate use" being sufficient to prevent the wife and children taking concurrently as joint tenants: *Jeffery* v. *De Vitre* (1); *Newill* v. *Newill* (2); *Audsley* v. *Horn* (3); *Theobald* on Wills (4). In the corresponding section (sect. 11) of the *Married Women's Property Act*, 1882, the words "separate use" are omitted, probably because it is already enacted by a previous section that property taken by a married woman shall belong to her for her separate use.

CHITTY, J. (after stating the facts):—

The policy was effected under sect. 10 of the *Married Women's Property Act*, 1870, which, so far as the case before me is concerned, has not been repealed by the *Married Women's Property Act*, 1882, and this is an application under that section for the appointment of a trustee. Although the section does not in terms empower the Court to declare the rights of the parties, I have been asked to express my opinion for the benefit of the children, as the fund is not large, being only £205. At any rate, I can go as far as this—I can state that I do not require the legal personal representatives of the wife to be made parties to the petition, and also that I do not require the representatives of the deceased child to be made parties.

The view I take of the policy is this: it is a declaration of trust operating *inter vivos*, and is a good declaration of trust. To avoid any question of this kind the section says: "A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate."

It appears to me that the effect of the policy and the Act taken together is to constitute a declaration of an executed trust, and

(1) 24 Beav. 296.
(2) Law Rep. 7 Ch. 253.
(3) 1 D. F. & J. 226.
(4) 2nd Ed. pp. 315, 316.

CHITTY, J. 1883 *In re* ADAM'S POLICY TRUSTS.

that all the Court has to do is to express its view of the construction of the two instruments taken together.

Now upon the policy being effected the settlor does not reserve to himself any power of appointment; therefore this is not an executory trust, but a trust declared on the face of the instrument. The question then is, what is the true construction of the instrument? In my opinion, there are only two possible constructions. One is that the wife took for life with remainder to the children; and the other is that the wife and children took as joint tenants. So far as the wife is concerned there is nothing to shew that there is to be a division among the objects of the trust: there is therefore a joint tenancy, and if I had to decide according to the ordinary rules of construction, I should be compelled to hold that all the objects took as joint tenants. In that case I should not require the representatives of the wife before the Court, nor the representatives of the deceased child. But I may express my opinion that, upon a fair construction of the policy, reading it with the Act, the wife took a life interest, and that she did so for two reasons. In the first place, the Act says that the policy expressed upon the face of it to be for the benefit of the man's wife, or of his wife and children, shall be deemed "a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed." If the wife takes as a joint tenant, the words of the Act, so far as they give her an interest "for her separate use," would have no meaning at all. Assuming a joint tenancy, the wife has a right of severance immediately upon the fund falling in, or before the money is received, and the money is usually payable by the insurance office six months after the death of the assured; but it could scarcely be said that the Legislature contemplated the remarriage of the wife within that period of six months, and that therefore the words "separate use" were intended to apply to so short a period. In my opinion, the Act here supposes an interest in the nature of a continuing interest in the wife, and that she is not to take over a share of the money in a lump sum, but that she is to have an interest in the fund such as a life interest would be. Therefore the fair inference is that she is to take an interest for her separate use for her life.

In the 11th section of the *Married Women's Property Act*, 1882, the words "separate use" are omitted, probably because the Act has previously made what the Legislature considered sufficient provisions as to the property of a married woman being held for her separate use; and it was considered unnecessary to insert any further provisions in the 11th section. There is another difference between the words of that section and the corresponding part of the 10th section of the Act of 1870. The new section speaks of a policy effected by a man "for the benefit of his wife, or of his children, or of his wife and children, or any of them." There it treats the interest of the wife and the interest of the children as two distinct things. That is an indication, though a slight one, that the Legislature never intended the wife and children to take concurrently, but that they should take separate interests; in other words, the wife and children do not take together, or the survivors of them, but the wife is spoken of separately from the children. That, therefore, shews that there is a distinction between the wife and children as regards the interests they are to take.

By analogy also to similar expressions in wills, the words "separate use," occurring in a gift similar to the trust declared by this policy and the Act of 1870, may be held to imply that the intention of the settlor was not to create a joint tenancy as between the wife and children, the words being read as marking out a gift to the wife distinct from the gift to the children.

In *Audsley* v. *Horn* (1) the gift was to the testator's granddaughter and her children; "but if they should die without issue," then over. The word "they" was considered to negative the supposition that the granddaughter and her children were to take concurrently. Accordingly it was held that she took for life with remainder to her children.

In *Jeffery* v. *De Vitre* (2) Lord *Romilly* held that a bequest to a married woman "for the benefit of herself and such children as she then had or might thereafter have by her then husband, free from the control of her husband," was sufficient to give a life interest only to the mother, apparently on the ground that she

(1) 1 D. F. & J. 226. (2) 24 Beav. 296.

CHITTY, J. 1883 *In re* ADAM'S POLICY TRUSTS.

took for her separate use. And in *Newill* v. *Newill* (1) Lord Chancellor *Hatherley*, as I understand, intended to lay down a rule of construction in such cases, for he says, "I must assume that the rule is such, that although the ordinary construction of a gift to a wife and children would give a joint tenancy, if I find anything in this will which can indicate a different intention, it must be followed. There are several authorities which establish such a rule, but in almost all of them reliance has been placed on some special circumstances." And he appears not to dissent from Lord *Romilly's* decision in *Jeffery* v. *De Vitre* (2).

Therefore, without absolutely deciding that in the case before me the wife took for life with remainder to the children, I state that as being my view. Whether that view is correct, or whether the wife and children take as joint tenants, the result, so far as concerns the wife and child who are dead, since both predeceased the assured, is in either case the same; and it will be quite sufficient for the present purpose to preface the order with an expression of opinion that the representatives of the wife and deceased child are not necessary parties to this petition, and that the surviving children take jointly.

I confess I am unable to discover on what ground Vice-Chancellor *Malins* proceeded in *In re Mellor's Policy Trusts* (3), when the case came before him the second time, and he held that the fund ought to be distributed as in the case of an intestacy. The Vice-Chancellor was much too good a lawyer to hold that a fund held on trust for a wife and children should go as on an intestacy; and the only ground for his reference to the *Statute of Distributions* seems to have been that the widow was in poor circumstances. Of course, that would not be a sufficient ground to proceed upon judicially. In the present case there is no reference to that statute in the policy or in the Act of 1870, and therefore I cannot find any ground for directing a distribution in accordance with that decision. Neither can I follow the first decision in *In re Mellor's Policy Trusts* (4), which appears to me to be inexplicable.

Considering that the Act of 1882 deals with the subject of

(1) Law Rep. 7 Ch. 253, 257.
(2) 24 Beav. 296.
(3) 7 Ch. D. 200.
(4) 6 Ch. D. 127.

policies for the benefit of the wife and children of the insured in almost the same terms as the Act of 1870, it would be very desirable, in my opinion, for the officers of insurance companies to have a form of settlement for use under the new Act of 1882, for this Act, through its being in almost the same terms as the Act of 1870, practically leaves matters much in the same position as they were in, under the Act of 1870.

It appears to me that this being an application under the Act of 1870, I have no jurisdiction to do more than appoint a trustee. If the wife did take an interest in accordance with Vice-Chancellor *Malins'* view, the result would in the present case be disastrous, because she would then have taken a share as under an intestacy, and having died in the lifetime of her husband he would have been entitled to the representation of her estate; and accordingly her share would go, not to the children, but to the husband's creditors.

I therefore make the order for the appointment of the trustee, prefacing it with the expression of opinion I have indicated (1).

Solicitor: *M. A. Orgill.*

(1) The order was eventually drawn up in the following form: "Upon the petition, &c., this Court, being of opinion that *Anne Adam* deceased in the petition named took no interest in the sum of £205 hereinafter mentioned, and that the Petitioners, as the surviving children of the said *David Adam* and *Anne Adam*, are entitled thereto as joint tenants, doth hereby appoint *William Butter*, of, &c., a trustee for the purpose of receiving from the *Scottish Provident Institution* the sum of £205 secured by the policy, &c., in the petition mentioned and purporting to be effected for the benefit of the said *Anne Adam* and the children of her marriage with the said *David Adam* under the provisions of the above-mentioned Act. The residue of such sum, after the payment of the costs of this application to be taxed by the Taxing Master as between solicitor and client, to be held by the said *William Butter* in trust for the petitioners."

G. I. F. C.

CHITTY, J.

1882

Nov. 21, 25; *Dec.* 6, 7, 14.

1883

Jan. 23; *April* 24.

In re TOOTAL'S TRUSTS.

Petition—Legacy Duty—Chinese Domicil—Anglo-Indian Domicil.

Notwithstanding the constitution of the Supreme Court of *China* and *Japan*, and the jurisdiction conferred on that Court over British subjects having a fixed place of residence in *China*, a British subject cannot acquire by residence in *China* a new domicil so as to exempt his personal estate on death from the operation of the *Legacy Duty Acts*.

British subjects resident in Chinese territory cannot acquire in *China* a domicil similar to that existing in *India*, and commonly known as Anglo-Indian.

THE facts and the arguments in this case fully appear from the judgment.

Macnaghten, Q.C., and *Method*, for the Petitioner.

Vaughan Hawkins, for the Crown.

B. B. Rogers, *Hood*, and *Bissill*, appeared for other parties.

The following authorities were cited or referred to:—*Arnold* v. *Arnold* (1); *In re Ewin* (2); *Udny* v. *Udny* (3); *Thomson* v. *Advocate-General* (4); *Attorney-General* v. *Forbes* (5); *Re Wallop's Trust* (6); *Bell* v. *Kennedy* (7); *Advocate-General of Bengal* v. *Ranee Sanomoye Dossee* (8); *The Laconia* (9); *The Indian Chief* (10); *Doucet* v. *Geoghegan* (11); *The Harmony* (12); *Bruce* v. *Bruce* (13); *Collier* v. *Rivaz* (14); *Phillimore* on Domicil (15); *Westlake* on Private International Law (16); *McLaren* on Wills and Succession (17); *Jarman* on Wills (18); *Yeap Cheah Neo* v. *Ong Cheng Neo* (19).

(1) 2 My. & Cr. 256.
(2) 1 C. & J. 151.
(3) Law Rep. 1 H. L., Sc. 441.
(4) 12 Cl. & F. 1.
(5) 2 Cl. & F. 48.
(6) 1 D. F. & J. 656.
(7) Law Rep. 1 H. L., Sc. 307.
(8) 2 Moo. P. C. (N.S.) 22.
(9) Ibid. 161.
(10) 3 Rob. Adm. 12.
(11) 9 Ch. D. 441.
(12) 2 Rob. Adm. 322.
(13) 2 B. & P. 229, n.
(14) 2 Curt. 855.
(15) Page 150.
(16) Pages 262, 263, 265.
(17) Vol. i. p. 4, par. 8.
(18) 4th Ed. vol. i. p. 3.
(19) Law Rep. 6 P. C. 381.

The following Acts of Parliament were also referred to: 6 & 7 Vict. c. 80, s. 3; 24 & 25 Vict. c. 114, and 20 & 21 Vict. c. 77, s. 93.

April 24. CHITTY, J.:—

The question raised by this petition is whether the personal estate of the testator, *J. B. Tootal*, is liable to legacy duty. The testator's will was proved in Her Majesty's Supreme Court for *China* and *Japan* at *Shanghai* and has not been proved in *England*. No part of his personal estate was locally situate in *England* at the time of his death, and it is admitted on the part of the Crown that probate in *England* is not required. In consequence of the claim made by the Crown for legacy duty the executors, who are also trustees of the will, have paid the funds representing the residuary personal estate into Court under the *Trustee Relief Act*. And the petition is presented by some of the residuary legatees, or persons claiming under them, asking for a declaration that the testator was domiciled at *Shanghai* at the time of his death, and consequently that no legacy duty is payable, and for a distribution of the fund on that footing.

The liability of the personal estate of a testator or intestate to legacy duty under the statutes in question depends on his domicil at his death; if his domicil is in *Great Britain* the duty is payable, if his domicil is out of *Great Britain* no duty is payable. That his personal estate may happen to be locally situate in *Great Britain*, or that the funds may be transmitted to *Great Britain* for the purpose of being paid to the legatees, are immaterial circumstances. The broad principle that the liability depends on domicil was established by the House of Lords in *Thomson* v. *Advocate-General* (1). The earlier decisions in conflict with that principle were overruled by that case. The previous decision of the House of Lords in *Attorney-General* v. *Forbes* (2) does not, when explained, conflict with *Thomson* v. *Advocate-General*. As was pointed out by Lord *Wensleydale* in *Attorney-General* v. *Napier* (3) the case of *Attorney-General* v. *Forbes* proceeded upon

(1) 12 Cl. & F. 1. (2) 2 Cl. & F. 48.
(3) 6 Ex. 217.

CHITTY, J. 1883 *In re* TOOTAL'S TRUSTS.

the assumption (which so far as the facts are stated in the reports was erroneous) that the domicil was in *India*, and it must be treated as a case of domicil in *India*. The first and principal question then is where the testator was domiciled at the time of his death.

It is admitted that his domicil of origin was in *England*. The burden of proof that he had acquired a new domicil of choice therefore rests on the Petitioners.

The facts are not in dispute. After some previous changes of residence, which it is unnecessary to trace, the testator in 1862 went to reside at *Shanghai* in the Empire of *China*, and, with the exception of some visits to *England* in 1864 and 1873 for health and business, he continued to reside at *Shanghai* till his death, which occurred in 1878. During his residence there he very extensively engaged in business in connection with newspapers, being the manager and part proprietor of the *North China Herald* and the *North China Daily News* and other publications and periodicals, all of which were published at *Shanghai*, and he was also a partner in a printing business there.

Evidence has been adduced on the part of the Petitioners shewing that for some years before his death he had determined to reside permanently at *Shanghai* and had relinquished all intention of ever returning to *England*, and that he had in fact on several occasions expressed his intention of not returning to *England*. This evidence remains uncontradicted on the part of the Crown. In his will he describes himself as of *Shanghai* in the Empire of *China*. In these circumstances it was admitted by the Petitioners' counsel that they could not contend that the testator's domicil was Chinese. This admission was rightly made. The difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicil, and brings the case within the principles laid down by Lord *Stowell* in his celebrated judgment in *The Indian Chief* (1), and by Dr. *Lushington* in *Maltass* v. *Maltass* (2).

But it is contended on the part of the Petitioners that the testator's domicil was what their counsel termed "Anglo-

(1) 3 Rob. Adm. 29. (2) 1 Rob. Ecc. 67, 80, 81.

Chinese," a term ingeniously invented in analogy to the term "Anglo-Indian."

To make this contention intelligible it is necessary to state some further facts. Under the treaties between Her Majesty and the Emperor of *China* of 1842, 1843, and 1858, British subjects with their families and their establishments are allowed to reside for the purpose of carrying on their mercantile pursuits without molestation at *Shanghai* and certain other cities, and to establish warehouses, churches, hospitals, and burial grounds. By the 15th clause of the treaty of 1858 it is stipulated that all questions in regard to rights of property or person arising between British subjects shall be subject to the jurisdiction of the British authorities. By the same treaty provision is made for the settlement of disputes between British subjects and Chinese by the joint action of the British consul and the Chinese authorities, and also for the Chinese authorities themselves affording protection to the persons and properties of British subjects.

The treaties do not contain any cession of territory so far as relates to *Shanghai*, and the effect of them is to confer in favour of British subjects special exemptions from the ordinary territorial jurisdiction of the Emperor of *China*, and to permit them to enjoy their own laws at the specified places. Similar treaties exist in favour of other European Governments, and the United States.

By virtue of these treaties and of the statutes 6 & 7 Vict. c. 80, and c. 94, the Crown has, by the Order in Council of the 9th of March, 1865, constituted a Supreme Court at *Shanghai*.

The first of these statutes, intituled "An Act for the better Government of Her Majesty's subjects resorting to *China*," enables Her Majesty by Order in Council to ordain "for the government of her subjects within the dominion of the Emperor of *China*, or being within any ship or vessel at a distance of not more than 100 miles from the coast of *China*," any law or ordinance as effectually as any such law or ordinance could be made by Her Majesty in Council for the government of her subjects within *Hong Kong* which had been ceded to Her Majesty. The second of the statutes, commonly known as the *Foreign Jurisdiction Act*, after reciting that by treaty, capitulation, grant, usage, sufferance,

CHITTY, J. 1883 *In re* TOOTAL'S TRUSTS.

and other lawful means, Her Majesty had power and jurisdiction within divers countries and places out of her dominions, and that doubts had arisen how far the exercise of such powers and jurisdiction was controlled by and dependent on the laws and customs of the realm, enacts that Her Majesty may exercise any power or jurisdiction which she then had, or at any time thereafter might have, within any country or place out of her dominions in as ample a manner as if she had acquired such power or jurisdiction by the cession or conquest of territory. The Order in Council by which the Supreme Court was established, provides that all Her Majesty's jurisdiction exercisable in *China* for the judicial hearing and determination of matters in difference between British subjects or between foreigners and British subjects, or for the administration or control of the property or persons of British subjects, shall be exercised under or according to the provisions of the order and not otherwise. It further provides that subject to the provisions of the order the civil jurisdiction shall, as far as circumstances admit, be exercised upon the principles of and in conformity with the Common Law, the rules of Equity, the statute law, and other law for the time being in force in and for *England*. The Supreme Court is a Court of Law and Equity, and a Court for matrimonial causes, but without jurisdiction as to dissolution or nullity or jactitation of marriage. It is a Court of Probate, and as such "as far as circumstances admit" has for and within *China*, with respect to the property of British subjects having at the time of death "their fixed places of abode in *China*," all such jurisdiction as for the time being belongs to the Court of Probate in *England*. It has jurisdiction for the safe custody of the property of British subjects not having at the time of death their fixed abode in *China* or *Japan*.

The exceptions from the jurisdiction of the Court as a matrimonial Court in regard to dissolution, nullity, or jactitation of marriage are important, and the effect of them is apparently to leave Englishmen subject to the jurisdiction of the Court for Matrimonial Causes in *England* in respect of the excepted matters.

Upon these facts it is contended for the Petitioners that there exists at the foreign port of *Shanghai* an organised community of British subjects independent of Chinese law and exempt from

Chinese jurisdiction, and not amenable to the ordinary tribunals of this country, but bound together by law which is English law, no doubt, but English law with this difference, that the English revenue laws do not form part of it, and that by residence and choice the testator became a member of this community, and as such acquired an Anglo-Chinese domicil.

The authorities cited in support of this contention for an Anglo-Chinese domicil relate to the Anglo-Indian domicil of persons in the covenanted service of the *East India Company*. These authorities are generally admitted to be anomalous (1). They are explained by Lord *Hatherley* in his judgment in *Forbes* v. *Forbes* (2) and by Lord Justice *Turner* in *Jopp* v. *Wood* (3). The point that the *animus manendi* was inferred in law from the obligation to serve in *India* as stated by Lord *Hatherley*, has no bearing on the case before me, in which the evidence is sufficient for general purposes to establish the *animus manendi*. But the observations of Lord Justice *Turner* that the *East India Company* was regarded as a foreign Government are material. He says (4), "At the time when those cases [on Anglo-Indian domicil] were decided, the Government of the *East Indian Company* was in a great degree, if not wholly, a separate and independent Government foreign to the Government of this country, and it may well have been thought that persons who had contracted obligations with such Government for service abroad could not reasonably be considered to have intended to retain their domicil here. They, in fact, became as much estranged from this country as if they had become servants of a foreign Government."

Lord *Stowell* in his judgment in the *Indian Chief* shews that in his time the sovereignty of the Great Mogul over the British territories in *India* was merely nominal, being, as he says, occasionally brought forward for purposes of policy, and that the actual authority of government over these territories was exercised with full effect by this country, and the *East India Company*, a creature of this country. His observation as to the authority of government being exercised by this country is not really incon-

(1) Dicey on Domicil, pp. 140, 141, 337.
(2) Kay, 341.
(3) 4 D. J. & S. 616.
(4) Ibid. 623.

CHITTY, J. 1883 *In re* TOOTAL'S TRUSTS.

sistent with the passage above cited from Lord Justice *Turner's* judgment. Lord *Stowell* was not addressing himself to the particular point for which I have quoted Lord Justice *Turner's* judgment. Although the Government of British *India* was English, being carried on principally by the agency of the chartered company, it was for all practical purposes a distinct Government from that of *Great Britain*, and in that sense it was, as Lord Justice *Turner* says, regarded as a foreign Government. At *Shanghai* there is a British consul, residing there by virtue of the treaties, but there is no government by British authority existing there, and there is nothing which can be regarded as a separate or independent Government, and the analogy which the Petitioners seek to establish with an Anglo-Indian domicil is not made out.

On principle, then, can an Anglo-Chinese domicil be established? The British community at *Shanghai*, such as it is, resides on foreign territory, it is not a British colony, nor even a Crown colony, although by the statutes above referred to the Crown has as between itself and its own subjects there a jurisdiction similar to that exercised in conquered or ceded territory.

Residence in a territory or country is an essential part of the legal idea of domicil. Domicil of choice, says Lord *Westbury* in *Udny* v. *Udny* (1), is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place with the intention of continuing to reside there for an unlimited time. He speaks of residence in a particular place, and not of a man attaching himself to a particular community resident in the place. In *Bell* v. *Kennedy* (2) he uses similar expressions. Domicil is an idea of the law, "it is the relation which the law creates between an individual and a particular locality or country." He refers to locality or country and not to a particular society subsisting in the locality or country. The difference of law, religion, habits, and customs of the governing community may, as I have already pointed out, be such as to raise a strong presumption against the individual becoming domiciled in a particular country; but there is no authority that I am aware of in English law that an individual can become domiciled as a member of a community which is not the

(1) Law Rep. 1 H. L., Sc. 458. (2) Law Rep. 1 H. L., Sc. 320.

community possessing the supreme or sovereign territorial power. There may be, and indeed are, numerous examples of particular sects or communities residing within a territory governed by particular laws applicable to them specially. *British India* affords a familiar illustration of this proposition. But the special laws applicable to sects or communities are not laws of their own enactment, they are merely parts of the law of the governing community or supreme power.

It may well be that a Hindoo or Mussulman settling in *British India*, and attaching himself to his own religious sect there, would acquire an Anglo-Indian domicil, and by virtue of such domicil would enjoy the civil status as to marriage, inheritance, and the like accorded by the laws of *British India* to Hindoos or Mussulmans, and such civil status would differ materially from that of a European settling there and attaching himself to the British community. But the civil status of the Hindoo, the Mussulman, and the European would in each case be regulated by the law of the supreme territorial power.

In the case before me the contention is for a domicil which may not improperly be termed extra-territorial. The sovereignty over the soil at *Shanghai* remains vested in the Emperor of *China* with this exception, that he has by treaty bound himself to permit British subjects to reside at the place for the purposes of commerce only, without interference on his part, and to permit the British Crown to exercise jurisdiction there over its own subjects, but over no other persons.

According to the Petitioner's argument the subjects or citizens of all the foreign states who enjoy similar treaty privileges would (subject to any particular exceptions arising from the law of their own country in relation to domicil), acquire under circumstances similar to those in the present case a new domicil of choice. If for instance a citizen of the *United States* were to reside at *Shanghai* with the intention of remaining there permanently, but not under such circumstances as would be sufficient to rebut the strong presumption against a Chinese domicil, and were to attach himself so far as he could to one of the European communities there, say, for an instance, the British community, he would, according to the Petitioner's contention, have lost his

CHITTY, J. 1883 *In re* TOOTAL'S TRUSTS.

domicil of origin, and would have acquired an Anglo-Chinese domicil, which for most practical purposes would be equivalent to an English domicil. In my opinion he would not acquire such a domicil.

It appears to me that there is no substantial difference as to the question I am considering between the residence of a British subject at *Shanghai*, or at any factory in *Turkey* or elsewhere, or the East, whether by virtue of special treaties, capitulations, sufferance, or the like. But such factories are not regarded as colonies or foreign countries for the purpose of domicil. There may be commercial domicil there in times of war with reference to the law of capture, but that is altogether a different matter.

No authority except those relating to Anglo-Indian domicil has been cited in support of the Petitioner's contention as to domicil. In *Maltass* v. *Maltass* (1), already cited, Dr. *Lushington* admitted to probate the will, valid according to the law of *England*, of an English merchant resident at a British factory at *Smyrna*. He held that if the treaty between *England* and the *Porte* was applicable to British merchants resident or domiciled in the ordinary acceptation of the term in *Smyrna*, the provisions of the treaty decided what was to be done in the case of succession to personal estate, namely, that it was to follow the law of *England*. But he considered that the deceased was domiciled not in a colony, but in *England*.

In the argument for the Petitioners great reliance was placed on the nature and extent of the jurisdiction of the Court at *Shanghai*, and the fact that the will has not been proved in *England*. The law administered by the Court at *Shanghai*, being for most practical purposes the same as that administered in *England*, the question of domicil is likely to arise only in exceptional cases like the present. The jurisdiction conferred on the Supreme Court at *Shanghai* is merely the jurisdiction of Her Majesty exercisable in *China*, and confined to British subjects. It is not exclusive and does not oust the jurisdiction of Her Majesty's Courts in *England*. No solid reason exists that I can discover for holding that the will of an Englishman "whose fixed place of abode" was at his death in *China*, could not be

(1) 1 Rob. Ecc. 80.

admitted to probate by the Court of Probate in *England*. I may observe that the term "fixed place of abode" is not equivalent to domicil. The technical term "domicil" was, it appears to me, purposely avoided. The only distinction between this case and *Maltass* v. *Maltass* (1) is the existence at *Shanghai* of an English Court of Probate. Similar Courts now exist in the Ottoman dominions and in *Eyypt*. In fact all these Courts are Consular Courts, or constituted on the same model with more or less jurisdiction.

In the case of *Attorney-General* v. *Napier* (2) letters of administration had been granted by the Courts established in *India*, where nearly the whole of the intestate's personal estate was locally situate at his death. In order to recover a comparatively small debt in *England*, administration was taken out in this country also. The intestate's domicil was in *England*. But in deciding that legacy duty was payable, the Court of Exchequer proceeded solely on the domicil, and did not even advert in the judgment to the grant of administration in *England*. Evidently that fact, as well as the fact that the Indian Court had jurisdiction to grant and had granted administration, were considered immaterial.

If an Englishman domiciled in *England* dies resident abroad, and no part of his assets are in *England*, and no probate or letters of administration are taken out in *England*, there may be great difficulty in asserting the Crown's right to duty, and inasmuch as foreign Courts will not enforce the revenue laws of this country the difficulty may in some cases be insuperable. But the Crown's right cannot depend on the greater or less difficulty in pursuing the remedy. In the case before me there is no difficulty in giving the remedy, since the fund is in Court, and under the *Legacy Duty Acts* this Court or its officers are bound to see that the legacy duty, if payable, is paid before the fund is parted with.

The circumstance that the will has not been proved here is also immaterial. It has been proved in a duly constituted British Court of competent jurisdiction, and, it being admitted that further probate here is not required, it follows that the

(1) 1 Rob. Ecc. 67. (2) 6 Ex. 217.

CHITTY, J.
1883
In re TOOTAL'S TRUSTS.

Court must look at the *Shanghai* probate before distributing the fund. This disposes of the argument that the Court cannot take notice of an alleged will of personal estate, unless it has been proved in this country. The argument which was addressed to me, founded on a close examination of the various provisions of the *Legacy Duty Acts*, for the purpose of shewing that they do not apply in the circumstances of this case, was substantially the same as that urged in the House of Lords in *Attorney-General* v. *Forbes* (1), and is disposed of by the decisions in *Thomson* v. *Advocate General* (2), and in *Attorney-General* v. *Forbes*, as explained by the Court of Exchequer in *Attorney-General* v. *Napier* (3).

For these reasons I hold that there is no such thing known to the law as an Anglo-Chinese domicil, that the testator's domicil remained English, and that the circumstances are not sufficient to create any exception from the broad principle that legacy duty is payable when the domicil is British. Consequently I think that the duty is payable.

Solicitors: *Johnson & Master; The Solicitor to the Inland Revenue; Clayton, Sons, & Fargus; Frankish & Buchanan.*

G. M.

CHITTY, J.
1883
April 30.

In re PLASKYNASTON TUBE COMPANY.

Limited Company—Issue of Shares at a discount—Registered Contract—Ultrà Vires—Reduction of Capital—Practice—Notice to Creditors—Advertisement of Petition—Companies Act, 1862, *Sched.* 1, *Table A, arts.* 26 *and* 27 [*Revised Ed. Statutes, vol. xiv., p.* 254]—*Companies Acts*, 1867 *and* 1877—*Gen. Ord. Nov.* 1862, *r.* 53—*Gen. Ord. March*, 1868, *rr.* 4, 5.

A limited company may, where so authorized by its articles of association, issue shares at a discount under a contract duly registered pursuant to sect. 25 of the *Companies Act*, 1867.

A company was empowered by its articles of association to increase its capital by the issue of new shares, and to issue such shares at a discount; also to reduce its capital. Of the company's original capital, which was made up of £10 shares, some of the shares taken were fully paid

(1) 2 Cl. & F. 48. (2) 12 Cl. & F. 1.
(3) 6 Ex. 217.

up, and others were issued and taken at the price ot £2 per share, £8 per share being credited as paid in pursuance of a contract duly registered under sect. 25 of the *Companies Act*, 1867. Part of their capital having been lost the company passed a resolution for the reduction of its nominal amount by writing off £7 from each fully paid £10 share and from each £10 share on which £8 had been credited as paid, and by reducing all shares remaining unissued from £10 to £3 per share.

A petition was then presented under the *Companies Acts*, 1867 and 1877, to obtain the sanction of the Court to this resolution, the petition being supported by evidence that all the creditors of the company had been paid up to a recent date, except one, who appeared and consented to the petition.

The Court made the order as prayed, and dispensed with the usual notices to creditors and advertisement of the petition.

THE *Plaskynaston Tube Company, Limited*, was incorporated on the 20th of May, 1874, with a capital of £50,000 divided into 5000 shares of £10 each. By the articles of association the company was empowered to increase its capital by the issue of new shares which (art. 5) might be issued at a discount; and by art. 45 the company was empowered to reduce its capital.

Shares to the following amounts and at the following prices had been taken in the company, namely 782 original £10 shares which had been fully paid up; 335 original £10 shares issued at the price of £2 per share, on which £8 per share was credited as paid, in pursuance of a contract duly registered under the *Companies Act*, 1867. This £2 per share had been called up and paid on the whole of the 335 shares. 3883 original £10 shares still remained unallotted. No fresh capital had been issued.

By a special resolution art. 45 was repealed and a new article substituted therefor, containing the words "The company may from time to time reduce its capital." The business of the company had been carried on at a loss, and by September, 1882, £7819 of the capital had become totally lost.

This led to a special resolution being passed on the 29th of September, 1882, and confirmed on the 25th of October following, by which it was resolved that the capital of the company should be reduced from £50,000 in 5000 shares of £10 each to £15,000 in 5000 shares of £3 each, and that such reduction should be effected by cancelling capital which had been lost, or was unrepresented by available assets, to the extent of £7 per share out of the £10 per share which had been paid upon each of the 782

CHITTY, J. 1883 *In re* PLASKYNASTON TUBE COMPANY.

shares, and to the extent of the £7 per share out of the £8 per share which had been credited as paid upon each of the 335 shares, and by reducing the nominal amount of all the other shares from £10 to £3 per share.

This petition was presented by the company, under the *Companies Acts*, 1867 and 1877, asking that its nominal capital which had been subscribed for and issued might be reduced by the above-mentioned sum of £7819; that such reduction might be effected, in pursuance of the above-mentioned resolution, by writing off £7 from each of the 782 shares on which £10 had been paid and from each of the 335 shares on which £8 had been credited as paid, thereby reducing the said shares from £10 to £3 shares; and that the shares remaining unissued might be reduced from £10 to £3 per share.

The petition alleged that the contemplated reduction of capital did not involve the diminution of any liability in respect of unpaid capital, nor the payment to any shareholder of any paid-up capital.

Upon the petition coming on for hearing on the 24th of February, 1883, his Lordship declined to make any order, the consent of creditors not having been obtained and he not being satisfied that there would be no diminution of liability within the meaning of the *Companies Act*, 1877, on the part of the holders of the shares issued at £8 discount. His Lordship moreover said he was not aware of any authority for issuing shares at 80 per cent. discount; it looked like issuing them at a sham price.

The petition subsequently came on again supported by an affidavit of the secretary of the company, stating that since the petition last came before his Lordship all the creditors of the company up to the 31st of March, 1883, had been paid with the exception of the *New British Iron Company*, to whom a sum of £1179 was due on current account up to that date, and that the iron company were satisfied that, inasmuch as all the shares issued by the tube company were fully paid up, the security for the debt of the iron company would in no way be diminished by the proposed reduction in the share capital of the tube company, and accordingly that the iron company had instructed counsel to appear and consent to the prayer of the petition, the effect of which

would only be to enable the tube company to make their undertaking more workable with £3 shares than it had hitherto been with £10 shares.

Russell Roberts, for the petition:—

I submit that as all the creditors have now been settled with except one, and that single creditor appears and consents, I have brought myself within sect. 11 of the *Companies Act*, 1867, and therefore your Lordship has jurisdiction to make the order. With regard to the issue of £10 shares at £8 per share discount, your Lordship has already decided, in *In re Ince Hall Rolling Mills Company* (1), that under a duly registered contract a company

(1) 1882. July 3, 10, 11. Chitty, J.

In re INCE HALL ROLLING MILLS COMPANY.

ADJOURNED SUMMONS.

The *Ince Hall Rolling Mills Company, Limited*, was formed in 1871, under the *Companies Acts*, 1862 and 1867, with a nominal capital of £15,000 in 1500 shares of £10 each.

The 26th and 27th clauses of the articles of association were as follows—being identical with articles 26 and 27 of Table A. in Schedule 1 to the *Companies Act*, 1862:—

"(26.) The directors may, with the sanction of a special resolution of the company previously given in general meeting, increase its capital by the issue of new shares; such aggregate increase to be of such amount, and to be divided into shares of such respective amounts, as the company in general meeting directs, or, if no direction is given, as the directors think expedient.

"(27.) Subject to any direction to the contrary that may be given by the meeting that sanctions the increase of capital, all new shares shall be offered to the members in proportion to the existing shares held by them; and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined; and after the expiration of such time, or on the receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company."

At extraordinary general meetings of the company, held on the 2nd and 30th of April, 1873, a resolution was passed and confirmed authorizing the directors to increase the capital of the company by the issue of new shares to the extent of £25,000, divided into 2500 shares of £10 each, and that such new shares should be offered from time to time in lots of such numbers at a time to the members of the company in the proportion mentioned in clause 27 of the articles of association, and at such premium (if any) as to the directors might from time to time appear desirable.

In pursuance of a resolution passed at a meeting of the board of directors, the following circular, dated the 3rd of December, 1879, was issued by the secretary to each of the shareholders:—

"Dear Sir,—The directors beg to

CHITTY, J. 1883 *In re* PLASKYNASTON TUBE COMPANY.

can issue shares at a discount, when authorized by its articles of association. This case is even stronger than the one referred

---

remind you that there are still 633 shares unallotted out of the last issue, and as they have received application for part of these shares at £1 per share discount, they will be glad to know within one week from this date whether you are desirous of taking up any portion: if so, please let me know what number you would require."

By an agreement dated the 6th of February, 1880, and made between the company of the one part, and the several persons named in the schedule thereto of the other part: after reciting the resolutions for the issue of new shares and of the circular, and that the several persons (five in number) named in the schedule thereto had agreed to take such respective number of shares as were set opposite to their names in the fourth column of the table set forth in the schedule at a discount of £1 per share, and had paid to the bankers of the company the several sums set opposite to their names in the third column of the same table, being £8 upon each share intended to be allotted to them; and that it was accordingly intended to allot and issue to them respectively the shares in the company bearing the numbers which were set forth in the fifth column of the same table, and were therein placed opposite to their names respectively; and that it had been agreed that all shares so to be allotted should be held as shares upon each of which £9 had been paid: It was witnessed that in pursuance of the resolutions and in consideration of each of the several persons whose names were contained in the first column of the said table having paid to the bankers of the company the sum set opposite to his name in the third column thereof, the company thereby agreed to allot and issue to the said persons respectively the number of shares set opposite to their names in the fifth column of the said table, at a discount of £1 per share: And it was thereby agreed and declared that the shares so to be allotted as aforesaid should be deemed and taken to have been issued and should be held as shares upon each of which £9 per share had been paid, and should be subject and liable to the payment of £1 per share and no more.

Pursuant to that agreement the shares were allotted to the several persons named in the schedule thereto, and the agreement itself was registered on the 23rd of February, 1880, and the shares were issued on the 24th of February following.

This was a summons taken out by the official liquidator that the several persons named in the schedule to the agreement might be ordered to pay the amount due from them respectively in respect of the discount at which the shares held by them were allotted.

Burton Buckley, for the liquidator, contended that, although there was no express decision on the point, it would be contrary to the policy of the *Companies Acts* to hold that a company could issue shares at a discount, and that the agreement of the 6th of February, 1880, was accordingly *ultrà vires* and void. He referred to *Lindley* on Partnership (4th Ed. p. 614); *Society of Practical Knowledge* v. *Abbott* (2 Beav. 559); *Fothergill's Case* (Law Rep. 8 Ch. 270); *Spargo's Case* (Law Rep. 8 Ch. 407); *Companies Act*, 1862, ss. 26, 174, sub-s. 5;

to, because here the articles expressly authorize the issue of shares at a discount.

Companies Act, 1867, s. 25; *Companies Clauses Act*, 1863, s. 21; *Companies Clauses Act*, 1869, s. 5; *Railway Companies Act*, 1867, s. 27; *Stannaries Act*, 1869, s. 12.

Macnaghten, Q.C., and *Bardswell*, for the shareholders holding shares issued at a discount, contended that these were shares authorized to be issued by clause 27 of the company's articles. That clause was identical with art. 27 in Table A., in sched. 1 to the *Companies Act*, 1862, which was of equal authority with the Act itself. The contract to take the shares was not *ultrà vires*, and it had been duly registered as required by sect. 25 of the *Companies Act*, 1867. They also referred to the *Companies Act*, 1862, s. 14; *In re Dronfield Silkstone Coal Company* (17 Ch. D. 76); *Anderson's Case* (7 Ch. D. 75); *Burkinshaw* v. *Nicolls* (3 App. Cas. 1004).

Buckley, in reply.

CHITTY, J. (after stating the facts) :—

The question which I have to decide is whether the persons named in the schedule to the agreement of the 6th of February, 1880, are or are not bound to pay the extra £1 representing discount. The 27th article of the articles of association is to the following effect :—[His Lordship read it, and continued :—] The important words in that clause are, "may dispose of the same in such manner as they may think most beneficial to the company." It has not been strictly proved that the directors made the offer mentioned in the 27th clause, but the fair inference is that the directions there given have been complied with. In that state of things the directors issued the following circular :—[His Lordship read it, and continued :—] The result was that no persons came forward to take the shares except the gentlemen mentioned in the agreement of the 6th of February, 1880, which was duly registered. The liquidator now contends that the contract was *ultrà vires*. This contention is, in my opinion, not well founded.

There is no doubt that under the circumstances in this case the directors had, on the construction of the 27th clause of the articles of association, which is in substance identical with the corresponding article in Table A of the *Companies Act*, 1862, power to dispose of the shares at a discount. The conclusion at which I have arrived is fortified by sect. 21 of the *Companies Clauses Act*, 1863, as amended by s. 27 of the *Railway Companies Act*, 1867, and the *Companies Clauses Act*, 1869, ss. 5 and 6. I think, therefore, that the company had power to dispose of these shares at a discount of £1. Assuming that the contract was *ultrà vires*, what would be the result? If it is *ultrà vires* it must be set aside *in toto*, the consequence being that these gentlemen would be entitled to be relieved of their shares and receive back the money paid upon them. The words of the Master of the Rolls in *Anderson's Case* (7 Ch. D. 75) are conclusive upon this point. He says (p. 95), "You cannot alter the contract to such an extent as to say, Though you have bargained for paid-up shares, we will change that into a bargain to take shares not paid up, and put you on the list of contributories on that ground." Then he says again (p. 104), "The general law, as I have before explained, does

CHITTY, J.
1883
In re PLASKYNASTON TUBE COMPANY.

Ince, Q.C., for the *New British Iron Company*, appeared to consent to the order, and suggested that, under the circumstances, the usual notices to creditors and advertisements of the presentation of the petition might be dispensed with: see *Companies Act*, 1867, s. 11; *Companies Act*, 1877, s. 4; *Companies Act*, 1862, Gen. Ord. Nov. 1862, rule 53; *Companies Act*, 1867, Gen. Ord. March, 1868, rules 4 and 5.

CHITTY, J., being of opinion that under the circumstances he might accede to the application, made an order sanctioning the special resolution of 1882, and dispensed with the notices and advertisement.

[The minute approved by the Court and ordered to be delivered to the Registrar of Joint Stock Companies was in the following form: "The capital of the company is £15,000 divided into 5000 shares of £3 each upon 1117 (782+335) of which the full amount is to be deemed to have been paid."]

Solicitors: *Tucker & Lake.*

---

not make a new contract for a man. If you set aside this allotment of shares, you must set it aside altogether, and then you cannot make the holder of them a contributory; and if you do not set it aside altogether you must adopt it."

It has been fairly contended by Mr. *Buckley* that the creditors have some rights apart from the company. That contention cannot, however, be maintained. As Lord Justice *James* said in *In re Dronfield Silkstone Coal Company* (17 Ch. D. 76, 97), "If the company could not question it (the transaction), neither can a creditor, for he can obtain nothing but what the company can get from the shareholders. The liability of the shareholders is to the company, and to no one else, except as regards the provisions relating to the liability of past members."

Here the agreement was in substance for the benefit of the creditors, and the company has acted within its powers. The summons must therefore be dismissed with costs. The liquidator to take his costs out of the estate.

Solicitors: *Sharp, Parkers, Pritchard, & Sharpe*, agents for *M. W. Peace, Wigan; Wynne & Son*, agents for *Mason & Grierson, Liverpool.*

G. I. F. C.

In re BLAKSLEY'S TRUSTS.

PEARSON, J.

1883
April 17.

Practice—Injunction to restrain Transfer of Stock—Notice in lieu of Distringas—5 Vict. c. 5, ss. 4, 5 [Revised Ed. Statutes, vol. viii., p. 950]—Rules of Court, 1875, *Order* XLVI., *rr. 2a*, 4, 7, 10.

A notice having been served on the *Bank of England* under rules 4 and 7 of Order XLVI., to prevent the transfer of stock or the payment of dividends thereon without notice to the persons serving the notice, the bank gave notice to them that an application had been made to the bank to allow the transfer of the stock and to pay the dividends thereon, and that they should comply with the application, unless an order of the Court should be served on them within eight days.

A motion was then made *ex parte* for an order to restrain the bank from permitting the transfer or paying the dividends.

Held, that the proper course was to grant an *interim* injunction over the next regular motion day, and that notice of the order must be served on the legal owners of the stock.

THIS was an *ex parte* motion, in the matter of the Act 5 Vict. c. 5, and in the matter of the trusts of the will and two codicils of *Martha Blaksley*, deceased, dated respectively the 6th of June, 1849, the 5th of October, 1854, and the 11th of November, 1854, for an order to restrain the *Bank of England* from permitting the transfer of a sum of £1717 10*s*. Reduced 3 per Cents. standing in the names of *Sophia Blaksley*, *Frances Blaksley*, and *Anthony George Yeates* in the books of the bank, and from paying any dividend due and to become due thereon.

The application was supported by an affidavit made by the solicitor of the applicants, who were two out of three persons who were, under the will and codicils of *Martha Blaksley*, respectively entitled as tenants in common for their lives to the income of the stock, with remainder to their respective issue. *Frances Blaksley*, who was the surviving executrix of the testatrix, died on the 7th of December, 1882, having by her will appointed three executrixes, of whom the present applicants were two. The affidavit stated that it appeared that *Frances Blaksley* some time before her death transferred the sum of stock in question into the names of herself and *Sophia Blaksley* and *A. G. Yeates*. After the death of *Frances Blaksley* the applicants made inquiries with the view of ascertain-

PEARSON, J. 1883 *In re* BLAKSLEY'S TRUSTS.

ing whether *Sophia Blaksley* and *A. G. Yeates* had been appointed trustees of the will of *Martha Blaksley*, and they were informed by *Sophia Blaksley* that she had never to her knowledge been appointed a trustee, but *A. G. Yeates* had refused to give any information. On the 30th of March, 1883, the deponent, by the instructions of the applicants, served a notice under rules 4 and 7 of Order XLVI. (in lieu of a *distringas*) on the bank, requiring them not to allow a transfer of the stock or to pay the dividends without notice to the applicants, and on the 12th of April the deponent received a notice in writing from the solicitors of the bank informing him that an application had been made to the bank to allow the transfer of and to pay the dividends on the stock, and that, unless an order was obtained and served on or before the 19th of April, 1883, the bank would permit the stock to be transferred and the dividends to be paid.

Gazdar, for the motion :—

By rule 2a (1) of Order XLVI. it is provided that no writ of *distringas* shall in future be issued, and by rules 4 and 7 service

(1) Order XLVI., rule 2a. "Order XLVI., rule 2, is hereby annulled, and no writ of *distringas* shall hereafter be issued under the Act 5 Vict. c. 5, s. 5."

Rule 3. "In the following rules of this order the expression 'company' includes the Governor and Company of the *Bank of England*, and any other public company, whether incorporated or not, to which 5 Vict. c. 5, s. 5, applies, and the expression 'stock' includes shares, securities, and money."

Rule 4. "Any person claiming to be interested in any stock standing in the books of a company may, on making an affidavit in or to the effect of the form B. 28 in the schedule hereto, and on filing the same in the Central Office, with a notice in or to the effect of the form B. 23 in the same schedule annexed thereto, and on procuring an office copy of the affidavit and a duplicate of the filed notice authenticated by the seal of the central office, serve the office copy and duplicate notice on the company."

Rule 7. "The service of the office copy of the affidavit and of the duplicate of the filed notice shall for the period of five years from the day of service, but not longer (unless the notice is renewed as after mentioned), have the same force and effect as if these rules had not been made, and a writ of *distringas* in respect of the stock had been duly issued under the Act 5 Vict. c. 5, s. 5."

Rule 10. "If, whilst a notice filed under this order continues in force, the company on whom it is served receive from the person in whose name the stock specified in the notice is standing, or from some person acting on his behalf or representing him, a request to permit the stock to be transferred or to pay the dividends

of a notice on the bank is substituted. But sect. 4 of the Act 5 Vict. c. 5, is still in force, and it gives the Court power in a summary way by motion or petition, without bill filed, to restrain the bank from permitting the transfer of any stock in the public funds, or from paying any dividend due or to become due thereon. That section also gives the Court power, on the application of any person entitled, to discharge or vary such order. I ask that an injunction may be granted, according to the form given in *Seton* on Decrees (1), restraining the bank for a fortnight from permitting the transfer of the stock or paying the dividends thereon. That will give ample time to any person interested to move to discharge the order.

PEARSON, J.:—

I think the proper course will be to grant an *interim* injunction over the 19th instant (the next motion day). You must serve the legal owners with notice of this order, and if they do not appear on the next motion day I can then extend the injunction.

Solicitor: *W. J. Myatt.*

---

thereon, the company shall not by force or in consequence of the service or of any renewal of the notice, be authorized, without the order of the Court, to refuse to permit the transfer to be made or to withhold the payment of the dividends for more than eight days after the date of the request."

(1) 4th Ed. vol. i. p. 283.

W. L. C.

FRY, J.
1883.
March 12, 13.
PEARSON, J.
April 20.

In re LESLIE.
LESLIE *v.* FRENCH.

[1881 L. 2427.]

Policy of Life Insurance—Payment of Premiums by Stranger or Part Owner—Lien—Salvage.

When a person, not the sole beneficial owner, pays the premiums to keep up a policy of life insurance, he is entitled to a lien on the policy or its proceeds in the following cases: (1.) By contract with the beneficial owner; (2.) By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation; (3.) By subrogation to their right of some person who, at the request of trustees, has advanced money for the preservation of the property; (4.) By reason of the right of a mortgagee to add to his charge any money paid by him to preserve the property.

In no other cases can a lien on a policy for premiums paid be acquired either by a stranger or by a part owner of the policy.

In re Tharp (1); *Swan* v. *Swan* (2); and *Hamilton* v. *Denny* (3) commented on.

Further consideration.

This action was brought for the administration of the personal estate and the execution of the trusts of the will of *J. C. W. Leslie*, who died on the 28th of November, 1877.

The material facts were shortly these:—On 27th of May, 1843, *Emily French*, then a widow, effected a policy on her own life with the *Atlas Assurance Company* for the sum of £5000. Shortly afterwards she married the testator, and upon the occasion of the marriage she handed the policy to him, and he thenceforth, until his death, paid the yearly premiums on the policy out of his own moneys. Prior to the marriage no settlement was executed, but on the 6th of April, 1848, Mr. and Mrs. *Leslie* executed a voluntary post-nuptial settlement by which an annual income, to which Mrs. *Leslie* was, under the will of her former husband, entitled for her life, was settled. The effect of that deed was to give a rent-charge of £800 a-year to Mr. *Leslie* during the joint lives of himself and his wife, and to secure the remainder of the annual income,

(1) 2 Sm. & Giff. 578, n. (2) 8 Price, 518.
(3) 1 B. & B. 199.

amounting to more than £7000, to Mrs. *Leslie* for her separate use. On the 22nd of September, 1849, Mrs. *Leslie* wrote a letter to her husband in which she expressed her intention "at the right time to break the *Atlas* policy." On the 28th of September, 1863, a settlement was made, to which both Mr. and Mrs. *Leslie* were parties, upon the occasion of the marriage of their daughter, *Marion Adelaide Leslie*, with Mr. *Walter Raleigh Trevelyan*. By that deed Mr. *Leslie* covenanted to pay to the trustees of the settlement, on the death of his wife, the sum of £6000, to be held by them on certain trusts for the benefit of Mr. and Mrs. *Trevelyan* and their issue, and Mr. *Leslie* assigned to the trustees the *Atlas* policy as security for the £6000, and entered into a covenant with them to pay the premiums on the policy during the life of his wife. In November, 1863, Mr. *Leslie* made his will, and thereby bequeathed any surplus of the moneys secured by the policy, after payment of the £6000 to the trustees of the *Trevelyan* settlement, upon the trusts of that settlement. He also made some specific bequests of no great value to his wife, thus raising against her a case of election between her right to the policy, which he had never reduced into possession during her life, and the benefits given to her by his will. He died on the 28th of November, 1877, leaving his wife surviving him. He had, from the time of his marriage, paid the premiums on the policy, and after his death the premiums were paid by his executor out of his estate.

The action was brought by the executor of Mr. *Leslie* against the executor of a deceased son of the testator, Mrs. *Leslie*, Mr. and Mrs. *Trevelyan* and their children, and the trustees of their settlement. The Plaintiff claimed a declaration of the rights and interests of himself and the Defendants in the policy and the moneys secured by it.

The Plaintiff claimed on behalf of Mr. *Leslie's* estate a lien or charge on the policy, and the moneys secured by it, in respect and to the extent of the premiums paid by Mr. *Leslie* and his executor for keeping the policy on foot.

Cozens-Hardy, Q.C., and *C. T. Simpson*, for the Plaintiff:—

We do not dispute that the policy was never reduced into

PEARSON, J. 1883 *In re* LESLIE. LESLIE v. FRENCH.

possession by the husband during his life, and that the wife is therefore entitled to it by survivorship. But we say that the husband was during his life, and now his estate is after his death, entitled to a lien on the policy and its proceeds for the premiums which he paid during his life, and which have been paid out of his estate since his death. He had a joint interest with his wife in the policy, for if he had survived her, he would have been entitled to the proceeds. When two persons are jointly interested in a policy, and one of them pays the premiums to keep it in existence, he is entitled to a lien upon it for what he so pays, and it makes no difference that the one who pays is the husband or the wife of the other: *Burridge* v. *Row* (1); *West* v. *Reid* (2); *Rowley* v. *Unwin* (3); *Todd* v. *Moorhouse* (4); *Norris* v. *Caledonian Insurance Company* (5); *Shearman* v. *British Empire Mutual Life Assurance Company* (6); *Gill* v. *Downing* (7). In the last two cases the right to a lien was placed on the principle of salvage. No doubt in *Saunders* v. *Dunman* (8) your Lordship observed that in *West* v. *Reid* and *Shearman* v. *British Empire Mutual Life Assurance Company*, the point was not really decided. Till the post-nuptial settlement was executed the wife had no separate estate; she could not, therefore, have kept up the premiums until then, and by the letter of the 22nd of September, 1849, she clearly intimated to her husband her intention not to keep it up. The relation of husband and wife does not exclude the right to a lien: *Pitt* v. *Pitt* (9).

[FRY, J.:—If I am tenant in common of a horse, and I pay for his food, without any request from the other owner, he being able to pay, should I have a lien on the horse for what I had so paid?]

There would be a lien.

[FRY, J., referred to *Ex parte Young* (10).]

Medd, for a trustee.

(1) 1 Y. & C. Ch. 183; S. C. on appeal, 13 L. J. (Ch.) 173.
(2) 2 Hare, 249.
(3) 2 K. & J. 138.
(4) Law Rep. 19 Eq. 69.
(5) Law Rep. 8 Eq. 127.
(6) Ibid. 14 Eq. 4.
(7) Ibid. 17 Eq. 316.
(8) 7 Ch. D. 825, 829.
(9) T. & R. 180.
(10) 2 V. & B. 242.

Glasse, Q.C., and *Dundas Gardiner*, for the persons beneficially interested under the *Trevelyan* settlement:—

If a part owner of a policy pays the premiums, no one can have the proceeds of the policy without repaying him what he has paid: *Aylwin* v. *Witty* (1). Mr. *Leslie's* interest in the policy was effectually assigned to the *Trevelyan* trustees, though the assignment which purported to be made by Mrs. *Leslie* did not bind her. But she must have known that her husband was paying the premiums out of his own private income. The trustees have a right to put her to her election between her right to the policy and the benefits given to her by her husband's will, and she cannot elect till she knows what the value of the property is. Therefore, it is necessary to decide now whether the lien for premiums exists. By the payment of the premiums the policy has been preserved for the benefit of somebody. Mrs. *Leslie* now claims it; surely it is the commonest equity that she should not have it without recouping the money expended in keeping it in existence. It is the case of two persons jointly interested in property, one of whom makes a payment for the common benefit. In *Ex parte Young* (2) the claim was made by part owners of a ship against the creditors of a bankrupt part owner, and it was held that there was no lien on the bankrupt's share of the ship for freight and other charges.

In partition actions an inquiry is directed as to moneys expended by a part owner, in repairs or otherwise: *Seton* on Decrees (3).

[FRY, J.:—That is, if he is charged with an occupation rent, he is to have an allowance for money expended in permanent improvements. Would he be entitled to any allowance for money laid out if he had not been in occupation of the property?]

Contribution may be enforced on general principles of justice, independently of contract: *Spottiswoode's Case* (4); *Hamilton* v. *Denny* (5). If one tenant in common repairs a house or a mill he has at common law a right to compel contribution from the other:

(1) 30 L. J. (Ch.) 860.
(2) 2 V. & B. 242.
(3) 4th Ed. vol. ii. p. 1006.
(4) 6 D. M. & G. 345.
(5) 1 B. & B. 199.

PEARSON, J. 1883 *In re* LESLIE. LESLIE *v.* FRENCH.

Co. Litt. (1); *Dering* v. *Earl of Winchelsea* (2). If there is only a personal right of action for the money expended, why should it not be enforced by a lien when the Court has power to do so in the present action? In *In re Tharp* (3) Lord *St. Leonards* held that a consignee of *West India* estates, appointed by the Court, had a right to be reimbursed his expenditure out of the rents of English estates of the same owner, although he was not the receiver of those estates. And Lord *St. Leonards* said that in *Ireland*, if a leasehold estate, to which half a dozen people were entitled in succession, many of them being mortgagees, according to certain priorities, was redeemed by the man who was entitled after every one else, he being in possession, by paying the landlord, who would otherwise have recovered the estate and taken it away from everybody, the payment was called salvage money, and the person making the payment was entitled to it as a prior charge to all the other incumbrances.

In *Jones* v. *Jones* (4) it was held that a tenant for life and remainderman must pay the fines for renewal of leases in proportion to their actual enjoyment. If there is no lien, there is at any rate a right of contribution, and that may give rise to a lien. The policy was a common property; the husband intended to make it his own if he should survive his wife. If she should survive, the policy would have been kept up for her benefit, and he expected that the premiums would then be repaid to his estate. *Ex parte Young* (5) is commented on in *Green* v. *Briggs* (6), and it is plain that it would not be extended. If the wife elects to take the policy as her own, she can only take it subject to the burden of paying the premiums.

Cookson, Q.C., and *C. C. Macrae*, for Mrs. *Leslie*:—

The claim is to a right *in rem*. There is a great distinction between such a right and a merely personal right of contribution: *Lindley* on Partnership (7). Under a partition decree a part owner is not entitled to any allowance for moneys laid out in

(1) 200 b.
(2) 1 Cox, 318.
(3) 2 Sm. & Giff. 578, n.
(4) 5 Hare, 440, 465.
(5) 2 V. & B. 242.
(6) 6 Hare, 395, 400, 407.
(7) 4th Ed. vol. i. p. 66.

substantial repairs and improvements unless he is charged with an occupation rent: *Teasdale* v. *Sanderson* (1). The principle of lien for salvage does not apply to a case in which the husband and wife were equally interested in the policy; each had an equal chance of survivorship. As between husband and wife the doctrine of advancement applies. The right of a tenant for life against a remainderman stands on a very special ground. The authorities which have been cited do not shew that a stranger who pays the premiums to keep up a policy acquires a lien on the policy for what he pays. The contrary was laid down in *Pennell* v. *Millar* (2). Of course, on setting aside a security the Court always adjusts the equities of the parties. It is said there is a lien in the case of joint tenants, and *Aylwin* v. *Witty* (3) is referred to. But in that case there was an original lien, and it is an authority only for this proposition—that if a man pays a premium for which he is entitled to a lien, and he afterwards pays further premiums in respect of which he has no such original lien, he will not be treated as a mere volunteer, but will be treated as having paid the further premiums in order to preserve his original lien, and will be entitled to a lien in respect of the further payments also. *Burridge* v. *Row* (4) is really adverse to the Plaintiff's claim. *Rowley* v. *Unwin* (5) and *Todd* v. *Moorhouse* (6) were cases of contract. In *Gill* v. *Downing* (7) the payment had been made by mortgagees. At any rate, the Vice-Chancellor dealt with it as a case of mortgage. In *Pitt* v. *Pitt* (8) there was an ante-nuptial mortgage by a wife, and after the husband's death the wife claimed to redeem the mortgage, the husband had during his life paid part of the mortgage debt, and he was held to be a purchaser *pro tanto*, and entitled to stand in the place of the mortgagee to that extent. *Hamilton* v. *Denny* (9) is an Irish case, and no authority was cited in the argument. A joint tenant may have a personal right to contribution from his co-tenant, but he is not entitled to a lien. *Coke* only speaks of a

(1) 33 Beav. 534.
(2) 23 Ibid. 172.
(3) 30 L. J. (Ch.) 860.
(4) 1 Y. & C. Ch. 183.
(5) 2 K. & J. 138.
(6) Law Rep. 19 Eq. 69.
(7) Ibid. 17 Eq. 316.
(8) T. & R. 180.
(9) 1 B. & B. 199.

PEARSON, J. 1883 *In re* LESLIE. LESLIE *v.* FRENCH.

right of contribution. *In re Tharp* (1) depended on the right of a consignee of West Indian estates and on Irish law, both of which are peculiar. *Jones* v. *Jones* (2) does not apply to the present case. No question could arise till after the execution of the post-nuptial settlement; before that the wife had no separate estate. Her refusal to pay the premiums comes to nothing. Her execution of the deed cannot bind her to allow a lien for the premiums paid. She had no power to deal with her reversionary interest; the deed could only bind her in honour. The recitals could not operate against her by way of estoppel. The payments of premiums made by the husband after the execution of the assignment of the policy to the *Trevelyan* trustees were made in fulfilment of his covenant with the trustees, and cannot be treated as payments made on behalf of his wife. *Clack* v. *Holland* (3) is a distinct authority that a stranger paying the premiums to keep up a policy acquires no lien. The cases as to joint tenants or tenants in common do not apply, for the interests of the husband and wife were exclusive alternative interests. He might have reduced the policy into possession at any time during his life by surrendering it to the office. The payments were made by him with full knowledge of the adverse title, and therefore the knowledge of the wife can give him no right by reason of her acquiescence: *Story's* Equity Jurisprudence (4).

Mrs. *Leslie* offered before the action to allow the policy to stand as security for the £6000 which Mr. *Leslie* had covenanted to pay to the trustees of the *Trevelyan* settlement, and she is still willing to abide by that offer.

Cozens-Hardy, in reply:—

Clack v. *Holland* is only an illustration of the rule that a trustee cannot give to another person a higher title than he has himself.

[FRY, J.:—But Lord *Romilly* said that a stranger could acquire no right to a lien.]

(1) 2 Sm. & Giff. 578, n.
(2) 5 Hare, 440.
(3) 19 Beav. 262, 277.
(4) 11th Ed. vol. ii. pl. 1237, pp. 544, 546.

In *Shearman* v. *British Empire Mutual Life Assurance Company* (1), and in *Norris* v. *Caledonian Insurance Company* (2), effect was given to such a lien, and in *Pennell* v. *Millar* (3) there is nothing to the contrary. It is said Mrs. *Leslie* has a legal right to the policy, but the policy is in the hands of the trustees of the settlement, and the company would not pay the money unless the policy was produced. At any rate there must be a lien for the premiums paid since 1877. That would be enough to bring the fund into Court, and then the Court would enforce all equities. In *Burridge* v. *Row* (4) the payment was made by a mere stranger. *Hamilton* v. *Denny* (5) is a clear decision in the Plaintiff's favour, and in *In re Tharp* (6) the same principle is recognised.

FRY, J.:—It appears to me that it would be for the benefit of Mr. and Mrs. *Trevelyan's* infant children that the offer made at the Bar on behalf of Mrs. *Leslie* should be considered. I will postpone delivering judgment for this purpose.

The parties could not agree to any arrangement, and before judgment had been delivered, Mr. Justice *Fry* had been appointed a Judge of the Court of Appeal. It was then arranged that Mr. Justice *Pearson*, to whom the action had been transferred, should adopt as his own the judgment which Lord Justice *Fry* was prepared to give.

April 20. PEARSON, J., read the written judgment of Lord Justice *Fry*, which he adopted as his own.

FRY, L.J. (after stating the facts as above), continued:—

As Mrs. *Leslie* is still alive the question now raised would not require immediate determination were it not for the fact that the will of Mr. *Leslie* raises against her a case of election, and that she is entitled to know between what properties she is called on to elect. The Plaintiff contends that the payments made by Mr. *Leslie* have created a lien or charge upon the money secured by the policy to the extent of the moneys paid. The Defendants deny this proposition.

(1) Law Rep. 14 Eq. 4.
(2) Ibid. 8 Eq. 127.
(3) 23 Beav. 172.
(4) 1 Y. & C. Ch. 183; S. C. on appeal, 13 L. J. (Ch.) 173.
(5) 1 B. & B. 199.
(6) 2 Sm. & Giff. 578, n.

PEARSON, J.

1883

In re LESLIE. LESLIE *v.* FRENCH.

The question thus raised has been fully discussed, and it becomes necessary to consider the various arguments which have been adduced and the numerous cases which have been cited upon the point.

In my opinion a lien may be created upon the moneys secured by a policy by payment of premiums in the following cases:

First. By contract with a beneficial owner of the policy.

Secondly. By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation.

Thirdly. By subrogation to this right of trustees of some person who may at their request have advanced money for the preservation of the property.

Fourthly. By reason of the right vested in mortgagees, or other persons having a charge upon the policy, to add to their charge any moneys which have been paid by them to preserve the property.

An instance of the first class of classes to which I have referred, viz., the creation of a lien by contract with the beneficial owner, is to be found in *Aylwin* v. *Witty* (1), in which Vice-Chancellor *Kindersley* held that where a mortgagor had contracted with his mortgagee to pay the premiums on a policy, and there were sureties for the performance of this contract by the mortgagor, and the sureties had been called upon to pay, and had paid the premiums, they were entitled as against the mortgagor to a lien upon the policy moneys. It is obvious that in this case the sureties were by contract with the principal debtor entitled to the benefit of all the securities which the mortgagee could have enforced, and, amongst others, to a charge for the premiums paid.

The second and third classes of cases are well illustrated by *Clack* v. *Holland* (2), in which it was held that trustees who paid premiums, under circumstances which gave them no right to a charge on the policy, could not create a charge in favour of a third person from whom they borrowed money for the purpose of the payments. To the same class may be referred *Gill* v. *Downing* (3), in which mortgagees, whose title as such

(1) 30 L. J. (Ch.) 860. (2) 19 Beav. 262. (3) Law Rep. 17 Eq. 316.

was good after, and only after, the death of the tenant for life, were held entitled to a lien during the subsistence of the tenancy for life. The mortgagees were placed by subrogation in the place of the trustees. Again, in *Todd* v. *Moorhouse* (1) the right of trustees to create a lien by subrogation of their rights was recognised, and it was determined that a person paying at the request of the trustees did not lose the right to the lien simply because the trustees might possibly have taken some other course to preserve the property.

Such appear to me to be the classes of cases in which a lien is created by payment of premiums. But I am unable to see that the Plaintiff has brought his case within any of them. There were no trustees for himself and his wife to whose rights Mr. *Leslie* could be subrogated, and there was no contract between him and her under which the payments were made.

I am further of opinion that, except under the circumstances to which I have referred, no lien is created by the payment of the premiums by a mere stranger or by a part owner.

I will first consider the case of payments by a mere stranger. On principle it is difficult, if not impossible, to see why such payments, which when made without contract or request are a mere impertinence, should create a lien upon the property. It is evident that in themselves they would not even create a ground of personal action against the person eased by the payment, for it is certain that moneys paid by *A.* for *B.* give no right of action against *B.*, unless they are paid upon his request.

In the next place, the law relating to confusion appears to me strongly to shew that no such right would exist. If I pour my gold into your heap, or put my silver into your melting-pot, or turn my corn into that in your granary, I have no right to an account or any relief against you, but, on the contrary, I have actually transferred the property in what was mine to the person with whose property I have mingled it.

Again, the authorities appear to me to be clear upon this point. In *Burridge* v. *Row* (2) the Lord Justice *Knight Bruce*, then Vice-Chancellor, used the following language (3): "Nothing that

(1) Law Rep. 19 Eq. 69. (2) 1 Y. & C. Ch. 183.
(3) 1 Y. & C. Ch. 191.

PEARSON, J. 1883 *In re* LESLIE. LESLIE *v.* FRENCH.

has been stated to me has had the effect of persuading me that, without any contract for that purpose, the mere fact of making payments of the premiums, however necessary that might be for the preservation of the property, would give the party making those payments a title to the property."

It may be perfectly true, as was contended before me, that Alderman *Winchester* was, during the period between 1828 and 1832, in the position of a person having no interest in the policy, and that the decree in *Burridge* v. *Row* (1), by giving him a lien for payments made during that period, has gone beyond the principle enunciated by the learned Vice-Chancellor. The important question is not whether the decree was accurate, but what was the principle of law enunciated by the Judge.

In *Clack* v. *Holland* (2) Lord *Romilly*, M.R., understood *Burridge* v. *Row* as laying down the principle for which I have cited it. "That," he said (3), "lays down a principle in accordance with my view of the case, and supports *Pinkett* v. *Wright* (4), and shews that a mere stranger by paying premiums on a policy cannot acquire a lien upon it. He can only acquire a lien by some contract with the persons beneficially interested in it, or with the trustee, where the trustee himself might have obtained a lien."

It has, however, been contended that a right is created in favour of a stranger making the payments upon the principle of salvage, and it is said to be contrary to natural equity that one person should gain by another man's loss. Whether there be such a doctrine as that of salvage applicable to cases of this description, was doubted by Vice-Chancellor *Kindersley* in *Aylwin* v. *Witty* (5), to which I have already referred.

With regard to *West* v. *Reid* (6) and *Shearman* v. *British Empire Mutual Life Assurance Company* (7), I will only say that I retain the opinion which I expressed with regard to those cases in *Saunders* v. *Dunman* (8).

In re Tharp (9), before Lord *St. Leonards*, has been referred to as an authority for the proposition that there is some general

(1) 1 Y. & C. Ch. 183.
(2) 19 Beav. 262.
(3) Ibid. 277.
(4) 2 Hare, 120; 12 Cl. & F. 764.
(5) 30 L. J. (Ch.) 860.
(6) 2 Hare, 249.
(7) Law Rep. 14 Eq. 4.
(8) 7 Ch. D. 825, 829.
(9) 2 Sm. & Giff. 578, n.

doctrine of salvage in cases of this description. But it appears to me that Lord *St. Leonards* was referring to a practice in the Irish law of conveyancing, which probably had its basis in agreement, and that, if he meant to assert, as the language used by him would rather imply, that an ultimate mortgagor making payments for the renewal of a lease was entitled to priority over his mortgagees, the proposition would seem to be inconsistent with the general law of the land.

In the next place, with regard to payments made by a part owner, it appears to me that, except by contract, such payments give no title to the person making them against the other part owner or part owners of a policy. That payments made by a mortgagor, who is in equity a part owner with the mortgagee, create no lien as against the mortgagee, was determined by Lord *Romilly*, M.R., in the case of *Norris* v. *Caledonian Insurance Company* (1). And, generally speaking, it is clear that money laid out by a tenant for life in improvements on the estate creates no lien against the remainderman. Again, in *Pennell* v. *Millar* (2), Lord *Romilly*, M.R., had to deal with a case in which *A.*, the owner of policies, had, as part of a transaction voidable for fraud, assigned them to *B.*, and had covenanted to keep them up. *B.*, claiming under this assignment, had paid premiums. *A.* instituted a suit to set aside the transaction on the ground of fraud, and the Master of the Rolls determined that the assignment was a valid security for the moneys actually advanced and not for the premiums paid by *B.*, his payment being a voluntary payment. In this case it is evident that, until the transaction was avoided, *A.* and *B.* were both possessed of interests in the policies, and yet the payment by one of the persons so interested was held to create no lien as against the other.

An argument was urged from the law of contribution. But, in the first place, the law of contribution arises only between persons joined for a common purpose, or persons who stand in the position of tenants in common or coparceners. In the next place, it is plain that the right to contribution is a personal right and the remedy is a personal remedy, and that there is no lien for the amount of the moneys in respect of which the right to

(1) Law Rep. 8 Eq. 127. (2) 23 Beav. 172.

PEARSON, J. 1883 *In re* LESLIE. LESLIE *v.* FRENCH.

contribution arises. This was determined by Lord *Eldon*, after great consideration, in the case of part owners of a ship, in *Ex parte Young* (1) and *Ex parte Harrison* (2), in which he overruled the previously expressed opinion to the contrary of Lord *Hardwicke*, and the same proposition, that there is no lien for the contributed moneys, is supported by *Kay* v. *Johnston* (3) and *Teasdale* v. *Sanderson* (4).

There are however, it must be admitted, two cases which look in the opposite direction. The first is *Swan* v. *Swan* (5), where the Court of Exchequer, sitting as a Court of Equity, refused to grant partition to one co-tenant, except upon the terms of his allowing a lien for the expenditure of his co-tenant in permanent improvements. But it appears doubtful how far this case has been generally followed, and it does not appear to me to be consistent with the opinion expressed by Lord *Romilly*, M.R., in *Teasdale* v. *Sanderson*.

The second case is *Hamilton* v. *Denny* (6). There a lease had been made to *A.* and *B.* as joint tenants. *B.* had settled his moiety of the property. *A.* had made a payment of the renewal fines, and he was held to be entitled to a lien on *B.'s* settled share. The decision was placed upon two grounds. It was said to be like the case of payments by a mortgagee, and it was said that the payments by *A.* were entitled to the same benefit as if they had been payments made by a trustee. It is perhaps not perfectly easy to see the strict analogy between these two cases and the case then before the Court. But, in my view, these two authorities are not sufficient to establish any such general proposition as that the right to contribution creates any lien on the property in respect of which the expenditure has been made, and they certainly are insufficient to support the Plaintiff's case. For in both those cases the submission to a lien was required from the plaintiff as a term of other relief which he sought, whilst in the case now before me the Plaintiff is affirmatively asserting his right.

It has been further urged that the Plaintiff is entitled to a lien, on the ground of the acquiescence of the other persons interested in the policy in the payments made by Mr. *Leslie*, and it is said

(1) 2 V. & B. 242.
(2) 2 Rose, 76.
(3) 21 Beav. 536.
(4) 33 Beav. 534.
(5) 8 Price, 518.
(6) 1 B. & B. 199.

that when one person allows another to expend money upon his property, and stands by during such expenditure, a lien is created in favour of the person making the expenditure. But it is certain that no such lien is created, except in the case of a person who makes the payment under a belief in the validity of his own title. In the present case there is nothing whatever to shew that Mr. *Leslie* acted under any mistake with regard to his rights in the policy, and it is certain that during a considerable part of the period covered by his payments he was in possession of the opinion of counsel as to his legal rights.

Another argument pressed upon me by the Plaintiff was derived from the relation of tenant for life and remainderman. It is well established that, if a tenant for life renews leaseholds and dies before the expiration of the renewed term, his estate is entitled to a lien on the interests in remainder, proportionate to the unexpired portion of the renewed term. But the equities governing the relation of tenant for life and remainderman are peculiar, and I fail to see any analogy between the case of a tenant for life making such a payment and the case of Mr. *Leslie* paying premiums on a policy over which he had full control at every moment of his life, which, I repeat, but for his contract on his daughter's marriage, he could have sold or surrendered without the consent of his wife.

In my judgment the arguments of the Plaintiff in support of his lien fail, and I conclude that, from the time of the marriage down to the year 1863, Mr. *Leslie* made the payments in question in maintenance of his own right in the policy, and that from 1863 he made the payments in pursuance of his covenant with his daughter's trustees, but that in no case did he make them by reason of any contract between himself and his wife, or by reason of any mistake as to his title to the policy, and consequently that he is entitled to no lien on the policy moneys as against her.

I therefore advise the learned Judge to whose Court this action is now attached to make a declaration accordingly.

Solicitors: *Bloxams & Ellison; Maples, Teesdale, & Co.; Dangerfield & Blythe.*

W. L. C.

POLLOCK, B. 1883 April 24: May 2.

KENSIT *v.* GREAT EASTERN RAILWAY COMPANY.

[1881 K. 1050.]

Riparian Owner—Non-riparian Owner—Taking Water—No Damage—Injunction.

The owner of land not abutting on a river, with the license of a riparian owner, took water from the river, and after using it for cooling certain apparatus returned it to the river undiminished and unpolluted :—

Held, that a lower riparian owner could not obtain an injunction against the landowner so taking the water, or against the riparian owner through whose land it was taken.

Northam v. *Hurley* (1) and *Sampson* v. *Hoddinott* (2) distinguished.

THE Plaintiff *T. G. Kensit* was the owner of land at *Mistley*, in *Essex*, and the Plaintiff *C. F. Norman* was his tenant. A stream of water had always flowed through this land. In 1856 the *Great Eastern Railway Company* bought some land of Mr. *Kensit*, thereby intersecting his land. On the land so bought the company built their railway, with a culvert through which the stream flowed. In August, 1881, *Robert Free*, who had land adjoining that of the railway company but not abutting on the stream, under a license or grant from the railway company put two pipes through the land of the company. By one of these pipes he drew up water, which he used for cooling or condensing purposes connected with his business as a saccharine manufacturer, and he then discharged it back into the stream by the other pipe. In the course of the hearing it was admitted that the water was returned to the stream uninjured and undiminished.

The Plaintiffs, as owners of land abutting on the stream below, brought this action to restrain the railway company and Mr. *Free* from so using the water.

W. Barber, Q.C., and *C. E. Jones*, for the Plaintiffs :—

A riparian proprietor can only use the water for his own purposes, and cannot allow the water of the stream to be used by a person who is not a riparian proprietor: *Wood* v. *Waud* (3);

(1) 1 E. & B. 665. (2) 1 C. B. (N.S.) 590.
(3) 3 Ex. 748.

Embrey v. *Owen* (1). His right to the water is not a right in gross which he can grant to another: *Stockport Waterworks Company* v. *Potter* (2). If he sells a part of his land he cannot sell with it the right to use the water: *Nuttall* v. *Bracewell* (3); *Ormerod* v. *Todmorden Joint Stock Mill Company* (4). It is not necessary for the Plaintiffs to prove substantial damage; it is enough that their right to the original flow of water has been infringed. Besides, a railway company has only a right to use land for their own purposes: *Wilts and Berks Canal Navigation Company* v. *Swindon Waterworks Company* (5).

W. Willis, Q.C., and *Warmington*, Q.C., for Mr. *Free*:—

All that the Plaintiffs are entitled to is to have the water as it was before, undiminished and unpolluted, and that they have. They cannot come here until their rights are injured. In every case there has been actual damage: *Sampson* v. *Hoddinott* (6).

Philbrick, Q.C., and *Smart*, for the company:—

All that has been done is a simple use of the water in an ordinary way, as for irrigation, and it is all returned to the stream. The Defendants do not claim any right to take away water or to pollute it. If such an action could be maintained every riparian proprietor could bring an action against any stranger who takes a bucket of water out of the river at any higher part of the stream. In *Earl of Sandwich* v. *Great Northern Railway Company* (7) there was some small damage. If an action can be maintained without damage, why in all these cases is evidence as to actual damage produced: *Orr Ewing* v. *Colquhoun* (8). Unless the case is one where a legal right of possession is infringed damage must be proved. Of course nothing can be done which would in time give a right: *Phear*, Rights of Water (9); *Harrop* v. *Hirst* (10). The reason why a simple trespass on land is actionable is, that if continued it would grow into a right. The reason why no case in point is to be found is that no one ever thought it worth while

(1) 6 Ex. 353.
(2) 3 H. & C. 300.
(3) Law Rep. 2 Ex. 1.
(4) 11 Q. B. D. 155.
(5) Law Rep. 9 Ch. 451.
(6) 1 C. B. (N.S.) 590.
(7) 10 Ch. D. 707.
(8) 2 App. Cas. 839.
(9) Page 3.
(10) Law Rep. 4 Ex. 43.

POLLOCK, B. 1883 KENSIT v. GREAT EASTERN RAILWAY CO.

to take proceedings when no damage had been suffered: *Kent's* Commentaries (1). If a riparian owner makes a lake or diverts the stream no one can complain.

Barber, in reply:—

The railway company claim a right to give Mr. *Free* leave to use this water, and have made no provision as to his use of it. In the case of an easement, the question of use or enjoyment comes in, but this is the case of a right which is infringed, and if not at once prevented prescriptive rights against the Plaintiffs will be acquired.

[POLLOCK, B., referred to *Elmhirst* v. *Spencer* (2).]

May 2. POLLOCK, B.:—

The Plaintiffs in this case, who are the owner and lessee of land abutting upon a brook at *Mistley*, in the county of *Essex*, have brought their action against the *Great Eastern Railway Company* and Mr. *Robert Free*, the second Defendant, who claims by license under the company. The Plaintiffs in their statement of claim allege that they as owner and lessee were entitled to the riparian rights of water both above and below a point at which the *Great Eastern Railway Company* crossed the brook upon which the Plaintiffs' land abutted, and they allege that the Defendants have interfered with the watercourse running through and by the land of the Plaintiffs, and have prevented the water in the said watercourse from flowing on, to, and through the Plaintiffs' land as heretofore. That last is a very material averment when we come to consider what are the Plaintiffs' rights in this case. Now the facts, as admitted by the Plaintiffs and Defendants, were these: that Mr. *Free* took by a culvert from the brook at the points at which the brook abutted upon the land of the company a considerable amount of water which by the culvert passed through the company's land, and then in pursuance of a grant made to him by the company went on and supplied him with a sufficient amount of water wherewith he could cool the pipes which he used as a maltster and saccharine manufacturer upon the land at the back of the company's land. That water

(1) 12th Ed. vol. iii. p. 445. (2) 2 Mac. & G. 45.

was returned at a spot very near the inlet by an outlet into the brook, and it was admitted by the Plaintiffs that it was returned, in such a manner that with regard to the rights of the Plaintiffs both above and below they had since the acts complained of had the benefit of the flow of water both with regard to the quantity and absence of pollution in the same manner as they had had heretofore. It was also admitted in point of law upon the part of the Defendants that the railway company had no right to make any grant to any person who was in the position of Mr. *Free*, who was a non-riparian proprietor, and whose land was not abutting on the brook. Upon those facts, with those admissions, the judgment of the Court must be based.

Now I propose very shortly to state the way in which it occurs to me in point of principle. I believe that at present no case has actually decided the very point in question in the present case, that point being whether when a riparian proprietor grants to a non-riparian proprietor certain rights which he has no right to grant, though at the same time they do not interfere substantially with the Plaintiffs' rights—whether in such a case any action can be maintained either for damages or for an injunction.

It is essential no doubt to consider what is the right to flowing water in these cases. It was sought to establish an analogy between the infringement of a right of that kind and the infringement of the possessorial right which a landowner has in his land. For this purpose I may simply state that the law of *England*,—and as far as I am aware the same may be said of the law of every other country—has never acknowledged the right to flowing water in a person by whose land it flows in the same sense and manner as the possessorial right to land. It has been spoken of in different ways as a thing that is a right *publici juris*, and a thing that is a natural right, and by other expressions of that kind; but in the result it comes to this, that it is a right of the same character as the right to the pure flow of air, and is a right of such a nature that the person who enjoys it cannot at any time fix upon a particular portion of water to which he is entitled. He cannot say of any single pint or globule of water that that pint or globule is his; he can only say that he is entitled to the flow of that water in its accustomed

POLLOCK, B. 1883 KENSIT v. GREAT EASTERN RAILWAY CO.

manner both as to quantity and as to purity. That being so, the cases which clearly shew, as they do, that a person who has the possessory right of land may successfully bring an action either for damages or for an injunction not merely where some damage is done to his property but where some right is infringed whereby his title may be put in danger, do not in my judgment bear any analogy to the present case. In the case of land a person has the absolute property in that land, and a great many acts which may be done, although they may not actually injure the land, still may be of such a character that they may imperil his future title, and in particular may perhaps if undisturbed grow into a right by reason of long user.

The only further question then that remains is this: One of the Defendants having admitted that as riparian owners they have no right to grant to a non-riparian owner the use of the water, a question arises whether by that user, although no present damage is done, any right could accrue by effluxion of time, and in my opinion that is not so. I think that that matter, as I will shew presently, is tolerably well established by authority, although there has been no express decision upon the subject.

With regard to the authorities, it is unnecessary (although it was quite right that I should be furnished, as I was very fully, with all the authorities upon the subject) for me to follow them now at any great length, because the proposition that I have shortly laid down with regard to the right to water is very clearly and fully expressed in many judgments of our Courts, and in particular in the judgment of Lord *Kingsdown*, which has been quoted again and again with approbation in our Courts, I mean the case of *Miner* v. *Gilmour* (1). A very similar proposition was laid down by Chief Baron *Pollock* in the case of *Wood* v. *Waud* (2), which has been cited on numerous occasions. In that case what Chief Baron *Pollock* took as a proper description of the right is taken from *Kent's* Commentaries (3), and the proposition is this: "Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), with-

(1) 12 Moo. P. C. 131, 156. (2) 3 Ex. 748, 774.
(3) 12th Ed. vol. iii. p. 439.

out diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law." That seems to me to be perfectly clear, and to be quite sufficient to express what are the rights of the parties in the present case. Taking that judgment of the Court in *Wood* v. *Waud* (1) and again in *Embrey* v. *Owen* (2), I find that doctrine very clearly established, and I certainly find no countenance in any of the judgments by any of the learned Judges in those cases for the proposition, that an action will lie by a riparian proprietor if there has been no diminution in quantity or purity of the water.

There are two other cases, *Stockport Waterworks Company* v. *Potter* (3) and *Nuttall* v. *Bracewell* (4), in which that which the Defendants have admitted in this case is very clearly established, namely, that a non-riparian proprietor can obtain no right through a riparian proprietor. In both of those judgments the present Lord *Bramwell* dissented, but it is quite clear that the judgment of the majority of the Court is that which has been upheld since, and which must be now acted upon.

There is one other authority bearing upon this part of the case which requires some little examination, and that is the case of *Sampson* v. *Hoddinott* (5). At first sight it might appear that some countenance was there given to the proposition asserted by the Plaintiffs in this action. In that case an upper riparian proprietor, for the purposes of irrigation, retained some water; though no actual damage was proved, yet the water was delayed, and it was not clear, or rather it was shewn to be probable, that if the plaintiff had exercised his full right to the water, then that full right would have been affected, and consequently he would have suffered damage. The same doctrine is to be found in some of the other cases, and is common to other instances in which this branch of law has been administered,

(1) 3 Ex. 748.
(2) 6 Ex. 353.
(3) 3 H. & C. 300.
(4) Law Rep. 2 Ex. 1.
(5) 1 C. B. (N.S.) 590.

POLLOCK, B. 1883 KENSIT v. GREAT EASTERN RAILWAY CO.

that is to say, you are to measure the plaintiff's right, not according to the amount of water actually used by him, but according to the amount of water which he is entitled to use; and therefore if a mill-owner should stop his mill for two or three months during which wrongful acts were done by riparian owners above him, it would be no answer in such a case to say, "you suffered no damage." The reason why he suffered no damage was simply because he did not choose to work his mill during that period of time. I think it is to that extent only that *Sampson* v. *Hoddinott* (1) affects the present case.

Then there are two cases, one not by any means a modern case, which distinctly shew that no cause of action arises unless there is a real injury to the plaintiff. One is *Williams* v. *Morland* (2), in which there are very careful judgments by Mr. Justice *Bayley* and Mr. Justice *Holroyd*, in which the rights of a plaintiff and defendant in such a case are very clearly stated. Mr. Justice *Bayley* states (3), "Flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it. Subject to that right all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water does so in derogation of the primitive right of the public. Now if this be the true character of the right to water, a party complaining of the breach of such a right ought to shew that he is prevented from having water which he has acquired a right to use for some beneficial purpose." And he goes on to point out in that case there was no deprivation of the water which had affected the plaintiff. Then Mr. Justice *Holroyd*, whose judgments are always particularly short and to the point, says this, "Running water is not in its nature private property. At least it is private property no longer than it remains on the soil of the person claiming it. Before it came there, it clearly was not his property. It may, perhaps, become, *quasi*, the property of another before it comes upon his premises, by reason of his having appropriated to himself the use of the water accustomed to flow through his lands before any other person had acquired a prior right to it." He

(1) 1 C. B. (N.S.) 590. (2) 2 B. & C. 910.
(3) 2 B. &. C. 913, 914, 915.

cites one of the other cases, and says, "The *gravamen* of the complaint is not that the water was prevented by the act of the defendant from coming down to the plaintiff's premises, and that he was injured by the want of water, but that it, in fact, flowed in a more impetuous manner, and thereby damaged the plaintiff's banks; but the jury have found that no damage has been done to the plaintiff's bank, by the manner in which the water was caused to flow by the act of the defendant. The jury have, therefore, found against the plaintiff in respect of the right of action which he claims. The mere obstruction of the water which had been used to flow through his lands does not of itself give any right of action. In order to entitle himself to recover, he should shew the loss of some benefit, or the deterioration of the value of the premises."

That is as far back as the year 1824, and I need not say that if damage is not shewn so that the Plaintiff can maintain an action, neither would a Court of Equity grant an injunction to restrain the Defendants from doing the act complained of. That very point did come before a Court of Equity in *Elmhurst* v. *Spencer* (1), in which Lord *Cottenham* gives a very clear judgment to the same effect. He says (2), "Now the plaintiff, before he can ask for an injunction, must prove that he has sustained such a substantial injury by the acts of the defendants as would have entitled him to a verdict at law in an action for damages. In the manufacturing districts, where there are as many mills along a stream as the water will supply, it would be extremely hard that a proprietor of one of such mills might not divert the stream within his own land, restoring it to its ancient channel before it entered into the lands of his neighbour without a diminution of the usual quantity. In such cases, and in the similar case of alleged obstruction to the use of light, in order to sustain an injunction, there must be both an unwarrantable use and an injury resulting from such use. In the present instance, however, the defendant's admission is quite consistent with the fact that the plaintiff has sustained no injury; and this Court will not take upon itself to adjudicate upon the question of whether this is a nuisance or not." That seems to be a very clear expression of

(1) 2 Mac. & G. 45. (2) 2 Mac. & G. 50.

POLLOCK, B. 1883 KENSIT v. GREAT EASTERN RAILWAY CO.

opinion in the same direction as that expressed in *Williams* v. *Morland* (1), and by Lord *Blackburn* in the case of *Orr Ewing* v. *Colquhoun* (2).

Then the only remaining proposition is one which I wish to consider very carefully, namely, whether possibly it could be said, as has been said in cases relating to land, that if this act which is now done by the Defendants, of diversion of the water, is not interfered with by the Plaintiffs, any right could be gained by the Defendants? This is an extremely important question when it is remembered that the right to the use of flowing water is measured, according to law, not by the amount which may prevent a lower riparian proprietor from having enough, but by the rights of the higher riparian proprietors, who are entitled to use such quantities as they may want for ordinary purposes. It is not necessary now to enter into what those purposes may be, but it may occur, if houses are built along the bank of a stream and each person uses water merely for domestic purposes, that in a dry season those lower down, especially if the stream is some miles long, might not get enough, and therefore in weighing this part of the case it is extremely essential to see that we do not put any further burden upon the lower riparian proprietors by letting persons extract water for a purpose which is not *per se* legal. I have not, however, any doubt upon this part of the case. I think the time from which any right would begin to accrue would not be the time at which such a diversion as was made in the present case arises, but it would be the time from which the Plaintiff could say that his water right was disturbed in quantity or purity. There is an authority which bears upon this, namely, *Sampson* v. *Hoddinott* (3). In the considered judgment of the Court delivered by Mr. Justice *Cresswell*, this is said (4): "On the part of the plaintiff it was denied, generally, that a riparian proprietor has any such right, and it was also contended, that, at all events, in this case the plaintiff had gained a title to the uninterrupted flow of the stream by immemorial enjoyment. As to the latter proposition, it appears to us that all persons having lands on the margin of a flowing stream have, by nature, certain rights to use

(1) 2 B. & C. 910.
(2) 2 App. Cas. 839.
(3) 1 C. B. (N.S.) 590.
(4) Ibid. 610.

the water of that stream, whether they exercise those rights or not; and that they may begin to exercise them whenever they will. By usage, they may acquire a right to use the water in a manner not justified by their natural rights: but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement. If the user of the stream by the plaintiff for irrigation was merely an exercise of his natural right, such user, however long continued, would not render the defendant's tenement a servient tenement, or in any way affect the natural rights of the defendant to use the water. If the user by the plaintiff was larger than his natural rights would justify, still there is no evidence of its affecting the defendant's tenement, or the natural use of the water by the defendant, so as to render it a servient tenement."

That seems to me to be on all fours with this case; and there the riparian proprietor who complained was above, as indeed he is in this case for some purposes, though he is both above and below the Defendants. It seems to me that I am bound by the judgment in *Sampson* v. *Hoddinott* (1) even if I did not concur in it, as I do. I am therefore led to the result that although if this stream were being regulated by an Act of Parliament, or if there were a public officer whose duty it was to interfere with any improper user of the water, it might be a very proper case for some regulation or interference, as the law of *England* does not give impersonal rights but only gives rights to a party to come to a Court when he is damaged in his legal interests, in this case no action would lie for damages and therefore, also, no action for an injunction can be maintained. There is only one other case which might seem at the first blush to be a little contrary to this view, and that is the case of *Northam* v. *Hurley* (2). In that case it was held that an action would lie for the diversion of the channel of a stream contrary to a grant. Although there was no diversion of water or actual damage to the plaintiff, it is quite clear that what the Court was there dealing with was not a

(1) 1 C. B. (N.S.) 590. (2) 1 E. & B. 665.

POLLOCK, B. 1883 KENSIT v. GREAT EASTERN RAILWAY CO.

natural right to the flow of water, but they treated the matter as a grant by the defendant, and they held that what he had done in altering the actual channel of the stream was in derogation of that grant, and therefore an action would lie. In no other case have I been able to find anything militating against the view I have taken, and in the result, therefore, I give judgment for both Defendants.

Solicitors for Plaintiffs: *E. Doyle & Sons*, agents for *Jones & Son, Colchester.*

Solicitors for Defendants: *Philbrick & Free.*

C. M.

In re PINK.

C. A.
1883
May 5.

Lunatic—Maintenance, past and future—Rights of Creditors—Insolvent Estate 16 & 17 *Vict. c.* 70, *s.* 116 [*Revised Ed. Statutes, vol. xi. p.* 664]—25 & 26 *Vict. c.* 86, *s.* 16 [*Revised Ed. Statutes, vol. xiv. p.* 188]—*Lunacy Orders*, 1883, *Orders* 35, 36, 45.

In managing the estates of lunatics the Court will have regard to the maintenance and comfort of the lunatic in preference to the claims of his creditors, although the estate be insolvent.

The Master in Lunacy made a certificate finding that the property of a lunatic produced an income of £163, and that his debts amounted to £7000, including £250 for his past maintenance in an asylum, and £374 for the past maintenance of his wife and children expended by the committee.

Held, on a summons taken out under Order 45 of the Lunacy Orders, 1883, on which some of the ordinary creditors appeared and claimed payment of their debts, that the expenses of past maintenance of the lunatic, his wife and children, must be paid in full, that capital producing £110 a year should be set aside for the lunatic's future maintenance, and that the residue should be divided among the ordinary creditors *pro ratâ*, who were to have a charge on the reserved capital, with liberty to apply on the lunatic's death.

MR. *CHARLES PINK*, being of unsound mind, but not so found by inquisition, resided from the 24th of December, 1878, to the 8th of April, 1881, at a private asylum called *Fisherton House*, near *Salisbury*. His wife and younger children were maintained by his son, *C. R. Pink*.

On the 5th of March, 1880, Mr. *Charles Pink* was found a lunatic by inquisition, and on the 9th of July, 1880, his son, *C. R. Pink*, was appointed committee of his estate.

On the 15th March, 1883, the Master made his certificate as to the fortune of the lunatic. He found that it consisted of real and personal estate, the annual income of which amounted to about £163; that his debts amounted to about £7000, including £250 due to the proprietors of *Fisherton House Asylum*, and £374 for advances made by *C. R. Pink* towards the maintenance of the lunatic's wife and family down to December, 1882, part having been advanced before and part after he had been appointed committee of the lunatic's estate; and he proposed that the two sums of £250 and £374 for the past maintenance of the lunatic and

C. A. 1883 *In re* PINK.

his family should be paid in full, and that a sufficient sum should be invested in 4 per cent. Indian Stock to produce two guineas a week, to be applied for the future maintenance of the lunatic, and that the remainder of the lunatic's estate should be divided among his creditors *pro ratâ*.

Lord Justice *Lindley*, before whom the matter was brought in chambers, directed the committee to take out a summons under Order 45 of the Lunacy Orders, 1883, in the terms of the proposal, and directed that the creditors should have notice of the application, and that the summons should be adjourned into Court.

The summons was not served on the creditors, but a circular letter was sent to all of them informing them of the application.

Two of the principal creditors, whose debts amounted together to more than £5000, appeared.

S. Dickinson, for the committee, supported the proposal in the certificate.

Barber, Q.C., and *Russell Roberts*, for one of the creditors:—

We do not oppose the payment in full of the past maintenance of the lunatic, but the payment of the past maintenance of his children is going beyond what the Court is in the habit of doing. We submit that after payment of the past maintenance of the lunatic all the property ought to be divided among the creditors. The Court ought to regard the interests of the creditors. Even in old times the Court sometimes did not entirely disregard them: *Ex parte Dikes* (1); but there is greater reason for not doing so now, because the public provision for lunatics is much better than it was. A lunatic is as well taken care of in a county lunatic asylum as in a private establishment. There is no suggestion in this case that the friends of the lunatic could not support him. The estate of the lunatic is quite insolvent, and if it were not for the lunacy the creditors would take the whole property under the bankruptcy laws. Even now they may obtain judgment and issue execution against it.

Vaughan Hawkins, for another creditor, referred to *In re Sit-*

(1) 8 Ves. 79.

well (1) where the maintenance of the lunatic's children was postponed to the claims of the creditors.

S. Dickinson, in reply :—

The creditors have never been allowed to interfere in dealing with a lunatic's estate, although the Court may in some cases, of its own accord, have considered their interests. In *In re Sitwell* the question related to the future, not the past, maintenance of the children. It is the duty of the committee to see to the support of the lunatic's wife and family, and great part of the expense in this case was incurred by the petitioner after he was appointed committee.

LINDLEY, L.J. :—

This case was adjourned into Court by my direction, and I may state at once why I did it, because certainly I have invited the controversy which there has been on this occasion, but which I did not at all anticipate. I never intended, when I suggested that notice of this summons should be given to the creditors, to lay myself or the Court open to the argument that the creditors had a right, or something equivalent to a right, to be paid in full, which would result in the lunatic being placed in a pauper lunatic asylum. I never dreamt of raising such a controversy as that. However, as the controversy has been raised, I wish most emphatically to protest against it.

It appears to me that the practice of the Court for the last 150 years has been to protect the lunatic, and to do what is most for the benefit of the lunatic—of course having regard to the interest of the creditors as far as possible. That is the duty imposed upon us by the statute, and that has been settled by the long established practice of the Court.

The reason I adjourned this matter into Court was this—that there was a proposition to pay two creditors in full, and to pay a dividend to the others. It appeared to me that that was a proposition which deserved consideration, and for that reason I directed the creditors to be served with notice in order that I

(1) W. N. 1881, p. 124.

C. A. 1883 *In re* PINK. Lindley, L.J.

might hear what they had to say upon the point. It was upon that ground alone that I adjourned the matter into Court.

The matter stands in this way. The two creditors who now appear are creditors to a very large amount. If we were to pay them in full the result would be that there would be next to nothing left for the lunatic, and he would have to go to a pauper lunatic asylum. It has been urged on behalf of the creditors that that is what we ought to do, on the ground alleged that a pauper lunatic asylum is now a much more comfortable place than it was some time ago. I protest against that suggestion. That is not my view of what would be for the benefit of the lunatic, nor is it the duty of the Court to do it.

The two sums which it is proposed in the summons to pay are these: there is first of all a debt of £250, which is due to the keepers of an asylum where this gentleman was placed for some time, the payment of which is not opposed; and there is a sum of £374, which the committee, who is a son of the lunatic, has expended in the maintenance of the lunatic's wife and family between the dates that have been mentioned, both prior and subsequent to the lunacy.

Now in dealing with that we must have regard to what is the ordinary practice, and that is stated in the 34th of the Lunacy Orders of this year (1). [His Lordship read the order, and

(1) Lunacy Orders, 1883, Order 34: "Immediately after inquisition found the party having the conduct of the proceedings shall take out a summons before the Master to inquire into the matters following:—(1.) The lunatic's situation. (2.) The nature of his lunacy. (3.) Who are his next of kin and heir-at-law. (4.) Who ought to be appointed committee of his person and of his estate. (5.) Of what his fortune consists, and the particulars thereof. (6.) The amount of his income. (7.) In what manner, at what expense, and by whom and where he has been maintained; what should be allowed for his past maintenance; what, if anything, is due, and to whom, in respect thereof, and to whom and out of what fund the same ought to be paid. (8.) What should be allowed for future maintenance; when the allowance ought to commence, and out of what fund it should be paid."

Order 36: "The Masters may also, when it shall seem to them expedient, inquire what debts (if any) not open to dispute are due from the lunatic, and to whom, and whether the same, or any of them, ought to be paid, and out of what funds or property, and they may entertain proposals for the settlement thereof, and for the compromise of any disputed debt, claim, or demand against the lunatic or his estate."

continued:—] Now the expression there used is "past maintenance," and for the purpose of making that inquiry it has always been construed as the maintenance of the lunatic's wife and children. That is a matter of practice. It is not limited to his personal maintenance.

The real question comes to this, whether supposing the Master had certified that this £374 ought to be allowed for the past maintenance of the lunatic in the sense in which the expression is used in the rule, it ought to be paid in full or not. We all agree that the certificate being in that form we should allow the payment in full. The rule to which I have been referring does not even allude to creditors. That subject is dealt with by another rule. The point of my observations is this, that the first thing to ascertain is what is for the benefit of the lunatic, and when you have provided for that you see what you can do for the creditors. In our opinion the sum ought to be paid, and therefore we propose to allow it in full.

As regards the allowance for the lunatic of two guineas per week, that is obviously right. He has been maintained at an expense of £1 per week in an asylum at *St Andrews, Northampton*, but that was a temporary arrangement and it cannot go on. He cannot be supported properly on that scale.

Therefore it appears to us we should make our order in the terms of the summons. Of course the creditors will have their costs, because they have been invited by me to come here in order to relieve the Court from the difficulty of dealing with preferential payments, and that difficulty has been got over. The order will be according to the summons, with liberty to the creditors to apply for payment when the time comes for them to do so.

BAGGALLAY, L.J.:—

I am of the same opinion, and have but very few words to add. The practice of this Court in Lunacy has been uniform for a period certainly as long as I can recollect, as well when practising as counsel as when sitting as Judge, and proper provisions for payment of past and future maintenance have always been the first matters to be considered and inquired into. The 34th of the

C. A. 1883 *In re* PINK. Baggallay, L.J.

Lunacy Orders of 1883 is really to the same effect as what was provided and acted upon before. [His Lordship read the rule and proceeded:—] Then there is a provision in the 36th order that after the Master has inquired what sums have been expended he shall take an account of the debts. I think that further rule was very properly added, for this reason, that, though provision in the first instance must be made for the maintenance of the lunatic, the amount must depend on the amount of the property, of course taking into consideration the amount of debts which he owes; but the fact that the amount of debts which he owes may be sufficient to exhaust the whole of the estate will afford no ground whatever for applying the whole of the estate for or towards payment of the lunatic's debts, and so sending him to a pauper lunatic asylum. I do not think that it has been seriously pressed upon us by the counsel for the creditors that we should take that course. To do so would be utterly contrary to all I have known of the practice of the Court.

I will only add this—that I think the present case illustrates the policy of the practice of not allowing creditors to appear upon applications of this kind, except under special circumstances; but having regard to what has taken place in the Master's office, I am of opinion that the Judge exercised a very wise discretion in allowing creditors to be served with notice of this summons; I think however that the arguments should have been limited to the question whether the two particular creditors should be paid in full or *pari passu* with the other creditors. A number of topics have been gone into which are entirely beside the question we had to decide.

FRY, L.J.:—

I concur.

BAGGALLAY, L.J.:—I think it would be fair to the creditors to declare that the creditors have a charge on the *corpus* of the fund for the balance of their debts.

Solicitors: *Lambert, Petch, & Shakespear; Harries, Wilkinson, & Raikes; Reep, Lane, & Co.*

M. W.

MOSTYN *v.* LANCASTER.

[1880 M. 3512.]

TAYLOR *v.* MOSTYN.

[1881 T. 77.]

C. A.
1882
V.-C. B.
May 3, 4, 5, 10, 11, 12, 13, 16.
C. A.
1883
April 17, 21, 23, 27; *May* 9.

Tenant for Life—Leasing Powers—Charge on Inheritance—Mortgagor and Mortgagee—Consolidation — Coal Workings — Removal of Pillars — Injunction.

A testator devised his real estates in strict settlement, making *M.* first tenant for life without impeachment of waste, and, after giving to male tenants for life powers to jointure their wives and provide portions for younger children, proceeded to authorize the tenants for life when in possession and the guardians of infant tenants for life in possession to demise any parts of the estates, except the mansion-house, for any term not exceeding twenty-one years at the best rent without fine or premium. He then empowered such tenants for life and guardians to grant any lease or leases of any mines or collieries or of any parcels of land for the purpose of digging for, winning, or gaining minerals or coal in any part of his estates "for such terms or number of years, and under and subject to such rents or reservations and agreements, as to such tenant for life or guardian or guardians shall seem reasonable and proper," and also to grant building or repairing leases for any term not exceeding ninety-nine years without any fine or premium. In 1843 *M.*, the tenant for life, by a deed reciting the leasing power, in consideration of £6000 paid to him by *C.*, demised the mines included in a mining lease made by the testator to *E.* in 1829, which would expire in 1848, to *C.* for ninety-nine years at a peppercorn rent, subject to redemption on payment of £6000 and interest. The deed contained an appointment of a receiver of the rents and royalties payable by the present and future tenants, and did not oblige *C.* to work the mines; but the tenant for life covenanted to grant, or concur in granting, such further leases as *C.* should require:—

Held, by *Bacon*, V.-C., and by the Court of Appeal, that this deed was a valid exercise of the power of leasing mines, and created a good legal mortgage for an absolute term of ninety-nine years.

By a deed of April, 1850, reciting the will and the power of leasing mines, and that *M.* was indebted to *S. P. & B.* in £60,000, and that it had been agreed that *S. P. & B.* should pay what was due on the mortgage of 1843, and take a transfer of that security, and that for securing to *S. P. & B.* the payment of the debt due to them from *M.* and any other moneys they might advance to him, it had been agreed that such further mortgage as thereinafter contained should be made; the mortgage debt of £6000 was assigned to *S. P. & B.*, and the term was also assigned to them subject to the existing equity of redemption, and *M.* granted his life estate to *J. C.* as

C. A.
1883
MOSTYN
v.
LANCASTER.

TAYLOR
v.
MOSTYN.

a trustee for *S. P. & B.* It was declared that the collieries and property assigned to *S. P. & B.* should be subject to the proviso for redemption thereinafter contained. There followed a proviso for redemption of all the mortgaged property on payment of £67,000, being the aggregate of the £60,000 and the moneys secured by the mortgage of 1843 :—

Held, by *Bacon*, V.-C., and by the Court of Appeal, that the £60,000 was effectually charged on the ninety-nine years term as well as on the life interest, for that this deed was a good exercise of the leasing power by varying the proviso for redemption in the deed of 1843, and that even if it were a defective exercise of that power the defect was one which a Court of Equity would make good.

The lease of 1829 contained covenants by the lessee to leave sufficient pillars of coal to support the roof, and these covenants were embodied by reference in the mortgage of 1843. In May, 1850, *M.* granted to *J. C.* as a trustee for *S. P. & B.* an ordinary mining lease for forty years, subject to a dead rent and royalties, which contained a covenant by the lessee not to remove pillars without the consent of *M.* or his assigns, or other the persons entitled to the colliery. *M.* after this conveyed absolutely all his interest in the property to the trustees of his eldest son, who had become entitled in fee in remainder. Afterwards *J. C.*, with the concurrence of the parties claiming under *S. P. & B.*, granted an underlease to *L. & S.* authorizing them to remove some of the pillars, which they proceeded to do, alleging that *J. C.* and the persons claiming under *S. P. & B.* were the persons entitled to consent :—

Held, that during the continuance of the lease of May, 1850, the pillars could not be worked without the consent of the assigns of *M.*, who became such after the execution of that deed, and that such working must be restrained at the suit of the son's trustees.

But, *held*, that if *M.* should survive the expiration of the lease of May, 1850, the parties claiming under the deed of April, 1850, as assigns of *M.*'s life estate, could during the remainder of *M.*'s life effectually consent to the removal of the pillars by persons interested under the deed of 1843.

BY will, dated the 8th of June, 1818, and republished on the 3rd of June, 1826, Sir *Thomas Mostyn* devised lands in *Flint*, of which he was owner in fee simple, comprising the *Mostyn Collieries*, in default of issue of his body, to the use of his nephew *Edward Mostyn Lloyd Mostyn* (then *E. M. Lloyd* and afterwards Lord *Mostyn*) and his assigns for life without impeachment of waste, with a limitation to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of *E. M. L. Mostyn* successively in tail male, with remainders over. The will empowered the respective male tenants for life under the will, when they should respectively become entitled in possession, to limit jointures to their wives and charge portions for

their younger children. The will then proceeded: "And I do hereby empower the respective tenants for life under this my will when they shall respectively be in the actual possession of the said manors lands and hereditaments hereinbefore devised to them, and the guardian or guardians of the person or persons who by virtue of the limitations hereinbefore expressed shall be tenant or tenants for life or in tail in possession of the devised property during the minority of such tenant or tenants for life or in tail, to demise or lease the said manors lands and hereditaments or any part thereof (except the mansion-houses offices and grounds of *Mostyn* and *Gloddaith*) to any person or persons for any term not exceeding twenty-one years in possession, so as that in every such lease to be granted under the power herein contained there be reserved, to be made payable half-yearly, or oftener, the best and most improved rent during the term of years to be thereby respectively granted that can be reasonably obtained, and without taking any fine premium or foregift for the making thereof respectively, with a power or condition of re-entry for non-payment of the same, and so as that none of the lessees be freed from impeachment of or made dispunishable for waste. And I hereby likewise empower the said respective tenants for life when in possession of my said estates, and also the guardian or guardians of any such infant or infants as aforesaid, to grant any lease or leases of any mines or mine quarries or quarry colliery or collieries or of any parcel or parcels of land for the purpose of digging for winning or gaining any ore minerals or coal in any part of my said estates for such terms or number of years and under and subject to such rents or reservations and agreements as to such tenant for life or guardian or guardians shall seem reasonable and proper; and likewise to make and grant any building or repairing lease or leases of any part of my said estates for any term or number of years not exceeding ninety-nine years in possession and not in reversion and at and under the best yearly rent or rents which can be reasonably had or gotten for the same, without taking any fine premium or foregift."

The testator died without issue on the 17th of April, 1831, and *Edward M. Lloyd Mostyn* (who is hereinafter called Lord *Mostyn*) thereupon entered into possession of the devised hereditaments,

C. A. 1883

MOSTYN v. LANCASTER.

TAYLOR v. MOSTYN.

including the *Mostyn Collieries*, as tenant for life under the will.

At the testator's decease the mines to which these actions related were subject to a lease dated the 12th of August, 1829, made between the testator of the one part, and *Thomas Eyton* and *John Price Eyton* of the other part, whereby the mines under the lands therein defined, with power to enter upon the demised premises or any part or parts thereof "(except and with such consent as hereinafter is mentioned)" and there to dig, get, and work the mines "(but subject to the provisoes, limitations, agreements, and conditions hereinafter contained)," and for that purpose to sink pits, &c., "and to do and perform all other reasonable acts and things necessary or proper for the carrying away the said coal, cannel, slack, and ironstone, and also full and free liberty of ingress, egress, and regress into, out of, and from the said lands, grounds, and premises (except and subject nevertheless as hereinbefore and hereinafter is mentioned)," and certain further powers, "except and always reserved out of this demise" the mines under and within a certain distance from the mansion-house and under a certain dock and quay or within a given distance from them, "and also except and always reserved," all timber and other trees on the lands, were demised to the *Eytons* for twenty-one years from the 31st of December, 1827, at the rent and royalties therein-mentioned. The lessees covenanted (*inter alia*) that they would during the term work the mines "(subject nevertheless to the provisoes, covenants, and agreements hereinafter contained) in a proper and workmanlike manner, and get and clear the respective mines and veins in the best and most approved manner in which they are performed in other works of the same or like kind in the neighbourhood of the said demised premises on the river *Dee*, and shall not nor will at any time during the said term, or at the end or other sooner determination thereof, knowingly, wilfully, or negligently carry or work the new works or mines, or those now opened, so near to old works adjoining thereto, as to endanger the pillars or partitions between the same, or so as to let the water out of the old cobs adjoining thereto, but shall and will leave a barrier or partition of solid coals of twelve yards in breadth between any adjoining pits or colliery, except as hereinafter

mentioned, and shall and will at the end or other sooner determination of this demise, leave sufficient walls or pillars for the support of the roof, and for preventing of thrusts and creeps, and not remove the same without the consent in writing of the said Sir *Thomas Mostyn*, his heirs and assigns, for that purpose first had and obtained."

By an indenture dated the 8th of December, 1843, made between Lord *Mostyn* of the first part, *Thomas Pryce Lloyd* of the second part, *Cymric Lloyd* of the third part, the Rev. *James Craig* of the fourth part, and *Alexander Samuel Craig* of the fifth part, reciting the leasing power in the will of Sir *T. Mostyn*, and that *James Craig* had agreed to lend to Lord *Mostyn* £6000, to be secured in manner thereinafter mentioned, it was witnessed that in consideration of £6000 paid to Lord *Mostyn* by *J. Craig*, he, Lord *Mostyn*, "in exercise and by virtue of every power, authority, and estate enabling him in that behalf and in him vested, did grant, bargain, sell, and demise unto the said *James Craig*, his executors, administrators, and assigns," the several collieries, pits, &c., therein-mentioned and which were delineated in the map or plan subjoined to the lease of the 12th of August, 1829, "and also all such or the like liberties, powers, authorities, and privileges as by the said indenture of lease were granted or reserved to the said *Thomas Eyton* and *John Price Eyton*, their executors, administrators, and assigns, and also all other liberties, powers, authorities, and privileges whatsoever, which are or shall be necessary or proper for searching for, raising, getting, and working the said collieries, &c. with effect (except as in the said indenture of lease is excepted);" and also all such surface and other lands and hereditaments, powers and privileges, as ought to be vested in *Craig*, his executors, administrators, and assigns, in order to the full and effectual enjoyment by him or them of the demised premises, or of the rents, royalties, &c., reserved in the lease of 1829, or to the making by him or them of any future lease or leases of the premises. "And also the reversion or remainder expectant on the determination of the term granted or demised by the said indenture of lease, and the rents, royalties, and reservations reserved by the same indenture, and all other the reversions, &c," to hold the said collieries, &c. (subject to the

C. A. 1883

MOSTYN v. LANCASTER.

TAYLOR v. MOSTYN.

lease of 1829), unto the said *James Craig*, his executors, administrators, and assigns, for the term of ninety-nine years, or for and during so much of the said term as Lord *Mostyn* "by virtue of any such power or authority and estate as aforesaid, or either of them, can or may demise the same," at a peppercorn rent, subject to a proviso for making void the term of ninety-nine years on payment by Lord *Mostyn*, his heirs, executors, or administrators, to the said *James Craig*, his executors, administrators, or assigns, of the sum of £6000, with interest at 5 per cent., on the 8th of June, 1844.

By this deed Lord *Mostyn* covenanted that he and every other person having any interest in the property would during the continuance of the estates created by the deed, or so long as any money should be due on that security, on the request of *J. Craig*, his executors, administrators, or assigns, do and make all such acts and assurances for more effectually assuring the premises to *J. Craig*, his executors, administrators, and assigns, in corroboration of and according to the true intent and meaning of the present deed, "or for making any lease or leases of the said collieries, mines, and premises, or any part or parts thereof under the said power in that behalf contained in the said will of the said Sir *T. Mostyn*, and which the said *James Craig*, his executors, administrators or assigns, may require to be made, or for concurring with the said *James Craig*, his executors, administrators, or assigns, in making any lease or leases of the same premises as he or they may think fit, as by the said *James Craig*, his executors, administrators, or assigns, or his or their counsel in the law, shall be reasonably required." And for better securing payment of the interest on the £6000 *A. S. Craig* was appointed receiver to collect and receive the rents, royalties, &c., of the demised premises "from the present and future tenants and occupiers thereof respectively," the trusts of the rents, &c., so received being to pay interest and expenses and the premiums on a policy for £7000 on Lord *Mostyn's* life, which was included in the security, and to pay the surplus to *J. Craig*, his executors, administrators, and assigns, towards payment of the £6000. The deed contained no stipulation obliging *J. Craig*, his executors, administrators, or assigns, to work the mines. *Thomas Pryce Lloyd*, who had a

rent-charge of £3000 under the will, concurred in this deed for the purpose of postponing his rent-charge to the £6000 and interest.

By deed of transfer dated the 14th of February, 1849, the executors of *James Craig* transferred their security to *R. W. Williams.*

By an indenture of the 26th of April, 1850, made between *Williams* of the first part, Lord *Mostyn* of the second part, *T. P. Lloyd* of the third part, *W. Strahan, J. D. Paul,* and *R. M. Bates,* bankers of the fourth part, and *J. T. Cookney* of the fifth part, reciting the will of Sir *T. Mostyn,* and the power of leasing mines, and the deed of the 8th of December, 1843, and the transfer to *Williams,* and reciting an assignment of certain chattels to *Lloyd,* and reciting that *E. M. L. Mostyn* was indebted to *Strahan, Paul, & Bates,* in £59,741, and that it had been agreed that they should pay to *Williams* what was due to him, and that they should take a transfer of his securities, and that for securing to *Strahan, Paul, & Bates,* the payment of the said debt owing to them from Lord *Mostyn,* and any other sums which they or the persons for the time being constituting their firm might advance to him or on his account, it had been agreed that such further mortgage, with such powers of sale and other provisions, should be made on the said colliery and hereditaments as thereinafter contained, and after reciting an agreement by *Lloyd* to transfer the above-mentioned chattels that they might be included in the security, *Williams,* in consideration of £7800 paid to him by *Strahan, Paul, & Bates,* and with the privity and approbation of Lord *Mostyn,* assigned to *Strahan, Paul, & Bates* all principal moneys and interest due to *Williams* on the security of the deed of the 14th of February, 1849, and the benefit of a judgment which had been obtained against Lord *Mostyn* for the moneys due on that security, to hold the same to *Strahan, Paul, & Bates* absolutely. By another witnessing part *Williams,* with the privity and approbation of Lord *Mostyn,* assigned to *Strahan, Paul, & Bates* the collieries and premises comprised in the deed of the 8th of December, 1843, to hold the same for all the term, estate, and interest granted by that deed, "subject nevertheless to the right and equity of redemption by means thereof." By another witnessing part, in consideration of the £59,741 owing as afore-

C. A.
1883
MOSTYN
v.
LANCASTER.
TAYLOR
v.
MOSTYN.

said, Lord *Mostyn*, on the nomination of *Strahan, Paul, & Bates*, assigned to *Cookney*, his executors, administrators, and assigns, all the collieries, coal mines, &c., which were mortgaged or intended to be mortgaged by the deed of the 8th of December, 1843, to hold the same to *Cookney*, his executors, administrators, and assigns, for all the term, estate, and interest of Lord *Mostyn* therein, but subject to the securities thereinbefore transferred, and subject to the proviso for redemption, and with and under the powers and provisions thereinafter contained. By another witnessing part *Lloyd* assigned the above-mentioned chattels to *Cookney* in trust for *Strahan, Paul, & Bates*, subject to the proviso for redemption thereinafter contained. "And it is hereby agreed and declared by and between the said parties to these presents, so far as they respectively are interested, that the said collieries, minerals, engines, machinery, goods, chattels, judgment, furniture, effects, moneys, and premises are so respectively assigned or assured to the said *W. Strahan, J. D. Paul*, and *R. M. Bates*, their executors, administrators, and assigns, subject to the proviso for redemption, and with and under the powers and provisions hereinafter contained." There followed a proviso that if Lord *Mostyn*, his heirs, &c., should within seven days after demand, given at any time after the 1st of April, 1853, pay to *Strahan & Co.* "not only the said sum of £7800 already advanced for obtaining the transfer hereinbefore made from the said *R. W. Williams*, but also the said sum of £59,741 now due or owing from the said [Lord] *Mostyn* to the said *W. Strahan, J. D. Paul*, and *R. M. Bates*, as aforesaid, and making together the aggregate sum of £67,541, and such further sum or sums of money (if any) as may be advanced unto or on account of the said [Lord] *Mostyn*," and if Lord *Mostyn*, his heirs, executors, administrators, or assigns, should in the meantime pay interest at £5 per cent. per annum on the above moneys, then "the said *J. T. Cookney*, his executors and administrators, together with the said *W. Strahan, J. D. Paul*, and *R. M. Bates*, or the survivors or survivor of them, or the persons constituting the said banking firm, or their or his assigns, shall upon the request, &c., reassign or reassure the said premises hereby mortgaged or intended so to be unto the said [Lord] *Mostyn* and *T. P. Lloyd* respectively, or their respective

executors, administrators, or assigns, according to their respective estates and interests, anything hereinbefore contained to the contrary notwithstanding." In case of such default in payment as therein mentioned a power was given to *Cookney* at the request of *Strahan, Paul, & Bates*, or of the members of their firm for the time being, to sell "the said colliery and other lands and effects hereby mortgaged," and he was directed out of the net proceeds to pay to the banking firm "such of the principal moneys and interest hereby secured or intended so to be as may then remain unpaid." The receipts of *Cookney* with the privity and approbation of the members of the banking firm were made good discharges to purchasers.

Further advances were made by *Strahan, Paul, & Bates*, whereby upwards of £134,940 17*s.* became due to them on the security of the deeds of December, 1843, and April, 1850.

By an indenture of lease of the 10th of May, 1850, made between Lord *Mostyn* of the one part and *J. T. Cookney* of the other part, after reciting that Lord *Mostyn* was entitled under the will of Sir *Thomas Mostyn* as tenant for life to the collieries, &c., and also that by such will he was authorized and empowered to grant any lease or leases thereof for such terms and under such rents, &c., as to him might seem reasonable, and that he for more effectually working the collieries had expended large sums in sinking new pits, &c.; that a further sum of £13,000 was required to be expended, which sum he was unable to provide, and that he had already incurred a debt, which he was unable to discharge, of £2500 for work and materials in and about such new pits, and that *J. T. Cookney* had agreed to advance the £2500, and to find and provide the further sum of £13,000 for completion of the same upon having a lease of the collieries granted to him upon the conditions thereinafter mentioned, Lord *Mostyn*, by virtue and in exercise of the power and authority to him in that behalf given or reserved by the will of Sir *Thomas Mostyn*, and of every other or any other power enabling him thereunto, demised the above collieries to *James Thomas Cookney* (who was admitted to have executed this indenture as a trustee for *Strahan, Paul, & Bates*), his executors, administrators, and assigns, for the term of forty years therefrom, subject to payment of the rent of £1500 per

C. A. 1883 MOSTYN v. LANCASTER. TAYLOR v. MOSTYN.

annum and the royalties therein mentioned and thereby reserved to Lord *Mostyn* and his assigns, and other the person or persons for the time being entitled to the premises thereby demised. This lease contained exceptions nearly identical with those of the lease to the *Eytons* in 1829 of all mines, &c., lying under the mansion-house at *Mostyn* and to the distance of 150 yards, and lying under the quay, pier, and dock, "the working of which may be liable to injure or endanger the safety of any part thereof, or endanger the support of the roof of the said colliery under or in the neighbourhood of the said quay, pier, and dock," with covenants on the part of the lessee for payment of the rents and royalties, and for working the coal, &c., in a fair, regular, proper, and workmanlike manner; and also covenants that *Cookney*, his executors, administrators, and assigns, would leave in good repair all underground roadways and aircourses to all unwrought coals in the mines, and also that the pillars of coal to be left in the mines for the support of the roofs of the coal therein should not be worked or wrought without the consent in writing of Lord *Mostyn* or his assigns, or other the person or persons entitled as aforesaid first had and obtained; for payment of the £2500 in discharging the debts then due and owing in respect of the collieries, and for laying out and expending in due course the £13,000 as the required amount for effecting the new winning and in and about the effectual completion of such works; for leaving a good and sufficient barrier of not less than forty yards in breadth and depth between the underground workings of the mines thereby demised and any other coal mines abutting thereon; and also that *Cookney*, his executors, administrators, and assigns, should and would at all times during that demise leave substantial, good, and sufficient walls and pillars for the support of the roof and for preventing of thrusts and creeps, and not remove the same or any part thereof without the consent in writing of Lord *Mostyn* or his assigns, or other the person or persons for the time being entitled to the said mines, lands, and premises thereby demised for that purpose first had and obtained.

This lease was by an indenture of the 7th of August, 1851, confirmed to *J. T. Cookney* by *Thomas Edward Mostyn Lloyd Mostyn* (hereinafter called Mr. *Mostyn*), who was then tenant in

fee simple expectant on the death of his father, Lord *Mostyn;* and *Cookney*, for himself, his heirs, executors, and administrators, covenanted with Mr. *Mostyn*, his heirs and assigns, that he, *Cookney*, his heirs, executors, administrators, and assigns would pay the rent and royalties and observe or perform the several covenants and conditions reserved by or contained in the lease of the 10th of May, 1850.

By an indenture dated the 29th of May, 1854, Lord *Mostyn* mortgaged his estate and interest in the above collieries to Mr. *Mostyn* for a large sum of money.

Mr. *Mostyn* died in 1861, leaving a will, by which he devised and bequeathed all his real and personal estate unto and to the use of the trustees therein named, whom he also appointed his executors. In 1869 Lord *Mostyn* released to the trustees of Mr. *Mostyn's* will all his estate and interest in the estates devised by the will of Sir *Thomas Mostyn.*

After various assignments the mortgage debt amounting to £134,940 17*s.* secured by the deeds of the 8th of December, 1843, and the 26th of April, 1850, was by an indenture of June, 1880, assigned to *Robert Lancaster* in trust for *John Taylor*, *John Lancaster*, and *Thomas Part* (the Plaintiffs in *Taylor* v. *Mostyn*), and the collieries and premises were assigned to *H. E. Taylor* for the residue of the term of ninety-nine years, and to *Robert Lancaster* for the life of Lord *Mostyn*, in trust for *J. Taylor*, *J. Lancaster*, and *Part*, subject to the equity of redemption in the collieries under the deeds of December, 1843, and April, 1850; and the lease of the 10th of May, 1850, was assigned to *J. Taylor*, *J. Lancaster*, and *T. Part.*

By deed of the 17th of December, 1880, the collieries were demised by *J. Taylor*, *J. Lancaster*, and *Part*, and by *R. Lancaster* and *H. E. Taylor* to *Joshua Lancaster* and *Thomas Storey* (the Defendants in *Mostyn* v. *Lancaster*) for a term of twenty-one years from the 31st of December, 1879; and by the terms of this lease, under which the Defendants were in possession of and working the *Mostyn* collieries, they were authorized to work the existing pillars of coal below a certain level known as the 130 yards level, and to work such of the mines as were below that level without leaving any walls or pillars.

C. A. 1883 MOSTYN v. LANCASTER. TAYLOR v. MOSTYN.

The action of *Mostyn* v. *Lancaster* was brought by the trustees of Mr. *Mostyn's* will against *Joshua Lancaster* and *Thomas Storey* for the purpose of restraining them from working, removing, or injuring any of the pillars left for the support of the roofs of the mines in the *Mostyn* collieries, and from working any mines in the said collieries without leaving substantial, good, and sufficient walls and pillars for the support of the roof, and for the prevention of thrusts and creeps. The Defendants by their statement of defence alleged that in order to work the mines in a fair, proper, and workmanlike manner it was proper and necessary to remove the pillars which they were removing; that the pillars were not necessary or useful for the support of the roof of any coal workable at a profit; and that no consent to their removal was requisite, but that if any consent was requisite, it was the consent of *J. Taylor*, *John Lancaster*, *Thomas Part*, *H. E. Taylor*, and *R. Lancaster*, as being the persons in whom the term of ninety-nine years and the estate for Lord *Mostyn's* life were respectively vested, and that they had consented in writing to the removal of the pillars below the 130 yards level, and that such removal would not cause any injury to the collieries.

The action of *Taylor* v. *Mostyn* was brought by the persons in whom the securities created by the deeds of December, 1843, and April, 1850, were now vested, against Lord *Mostyn* and the trustees of Mr. *Mostyn's* will, to obtain a declaration that by the deed of December, 1843, a valid lease of the collieries was granted for the term of ninety-nine years; an account of what was due for principal, interest, and costs on the security of the two deeds, and payment, and in default of payment foreclosure.

In addition to the question of danger to the collieries by the course of working carried on by the Defendants, the questions raised in these actions, which were heard together, were:

(1.) Whether under the powers contained in Sir *Thomas Mostyn's* will, Lord *Mostyn*, the first tenant for life, could effectually limit a term of ninety-nine years by way of mortgage, and if so,

(2.) Whether the term of ninety-nine years was effectually charged with the whole of the sums secured by the deed of the 26th of April, 1850, or only with the original £6000 and interest.

(3.) Whether the provisions against removing the pillars contained in the earlier lease of 1829 were incorporated in the deed

of December, 1843, so as to oblige the grantees to leave pillars during the term of ninety-nine years.

(4.) Whether the consent of the mortgagees, either as owners of the term of ninety-nine years, or as mortgagees of Lord *Mostyn's* life estate, was sufficient to authorize the removal of the pillars either during the continuance of the lease of May, 1850, or afterwards.

Evidence, the result of which is stated in the judgment of the Vice-Chancellor, was given at considerable length upon the question whether the pillars could be removed without causing a subsidence of the roof and irreparable injury to the collieries, which were under the estuary of the River *Dee*, and whether the removal of the pillars was a fair, proper, and workmanlike mode of working the collieries.

The actions came on for hearing before Vice-Chancellor *Bacon* on the 3rd of May, 1882.

Davey, Q.C., and *A. T. Watson*, for the Plaintiffs in the first action:—

We are entitled to restrain the Defendants *Joshua Lancaster* and *Thomas Storey*, who are sub-lessees from the assignees of the lease of May, 1850, from removing without the Plaintiffs' consent the pillars of the coal mine, both as being an improper and improvident mode of working which will cause a subsidence, and render the mine unworkable by those entitled in remainder, and also as a breach of the covenants contained in the lease of 1850 under which the Defendants claim, and by which they are bound.

The Defendants allege that if any consent to this mode of working is necessary, it is the consent of the persons in whom the term of ninety-nine years and the estate for Lord *Mostyn's* life are now vested, and that such consent has been given. We say that the deed of 1843 created no effectual charge upon the inheritance, and was valid for the term of Lord *Mostyn's* life only. It was not a valid execution of the leasing powers contained in Sir *T. Mostyn's* will, being not a lease for the best rent obtainable, with the usual covenants and incidents of a mining lease on such terms, &c., as were reasonable and proper for the general manage-

C. A.
1883
MOSTYN
v.
LANCASTER.
TAYLOR
v.
MOSTYN.

ment and development of the estate—for such is the intent and meaning of the power—but a mortgage by demise for a term of ninety-nine years at a peppercorn rent, reserving no beneficial rent or royalties, with no obligation on the lessee to work the coal, and with a proviso for redemption on repayment of £6000 and interest. The leasing powers given to Lord *Mostyn* in addition to his life estate were powers for the benefit of all parties interested in the estate, and not given to him by way of personal privilege: *Hill* v. *Hill* (1); and did not confer upon him any power to make a lease exceeding his life estate: *Vivian* v. *Jegon* (2); such demise being a mere mortgage with none of the incidents of a mining lease, and altogether inconsistent with the terms of the power. But assuming that a valid charge on the inheritance beyond the term of Lord *Mostyn's* life was created by the deed of 1843, we submit that the deed of May, 1850, operated as a surrender thereof, and in any case that charge must long since have been satisfied, as the mortgagees, who have been in possession since 1850, would be bound by the terms of the deed to apply the profits in paying off the £6000 and interest. Assuming that the Defendants are the assignees of Lord *Mostyn's* life estate with the immediate reversion on the expiration of the term of ninety-nine years, as mortgagees they are merely incumbrancers on the property without any rights of ownership, and though at law they are owners of the legal estate, the person entitled to the equity of redemption is recognised in equity as the owner of the property with all the rights and powers which are incident to his estate: *Casborne* v. *Scarfe* (3); *Heath* v. *Pugh* (4); so that the Defendants have no authority, and are not the persons, to exercise the powers of leasing given to the tenant for life and of consenting to the mines being worked otherwise than according to the covenants contained in the lease to the *Eytons* of 1829, which were expressly repeated in the lease of 1850.

We submit therefore upon the evidence that there has been a clear breach of the covenants as to the mode of working, and as a matter of law that the Defendants are bound by those covenants, and that no consent to their breach has been given by the

(1) 6 Sim. 136.
(2) Law Rep. 3 H. L. 285.
(3) 1 Atk. 603.
(4) 6 Q. B. D. 345.

persons who alone have the power of giving such consent. Then it is said that the Plaintiffs are suing as mortgagors, and have not offered to redeem. But the Defendants *Joshua Lancaster* and *Thomas Storey* are merely sub-lessees and not mortgagees at all, and would not properly be parties to a redemption action. And if the assignees from *Strahan, Paul, & Bates*, under whom the Defendants claim, are asserting their rights as mortgagees, neither they nor the persons claiming under them can claim the benefit of their rights as lessees. But in any case the Defendants have made no counterclaim for foreclosure or demand to be redeemed, and in a mortgagors' action an offer to redeem is no longer necessary, as the Defendants can now apply for that by way of counterclaim. In the cross action we ask that it may be declared that the deed of 1843 did not create a charge on the estate beyond Lord *Mostyn's* lifetime, but if a valid charge on the inheritance was thereby created, then that it may be declared that it was a charge for £6000 only, and that the rents and royalties received under the lease of 1850 were applicable in payment of the £6000 and interest.

Marten, Q.C., *A. L. Smith*, *Finch*, and *J. Dixon*, for the Defendants in the first, and the Plaintiffs in the second action:—

The deed of 1843, under which we claim, was a valid exercise by Lord *Mostyn* of the leasing powers contained in Sir *T. Mostyn's* will. The gift of an estate for life to Lord *Mostyn*, dispunishable for waste, carried with it the right of opening and working mines and granting leases for that term without reference to any power, and the addition of leasing powers carried with it the power of making leases to extend beyond the life estate: *Vivian* v. *Jegon* (1); *Davidson's* Conveyancing (2). The power to grant mining leases (which is distinguished in the will from that of granting building leases at the best yearly rent without taking any fine or premium) is general, and in no way limited, and is to be exercised as to the tenant for life "shall seem reasonable and proper," and the Court will not cut down the absolute discretion thus given to the tenant for life: *Sugden* on Powers (3);

(1) Law Rep. 3 H. L. 285. (2) 3rd Ed. vol. iii. pp. 280, 281, *et seq.*
(3) 8th Ed. pp. 433–4–7.

C. A. 1883 MOSTYN v. LANCASTER. TAYLOR v. MOSTYN.

Muskerry v. *Chinnery* (1); and no supposed or real hardship to the remainderman, either by the length of term for which the lease is granted, *Attorney-General* v. *Moses* (2); *Attorney-General* v. *Wray* (3), or by the fact that no beneficial rent is reserved, *Talbot* v. *Tipper* (4), will have the effect of avoiding the execution of the power, although the nature of the will or settlement might have led to the conclusion that the power is in excess of what was intended, and that a limited amount of charge only was intended: *Long* v. *Long* (5); *Sugden* on Powers (6); *Sheehy* v. *Lord Muskerry* (7); *In re Molton* (8). A good legal term of ninety-nine years in exercise of the power was therefore created by the deed of 1843, and that deed is not the less a lease, because it has the incidents of a mortgage. It merely refers to *Eyton's* lease for the purpose of identifying the colliery, and does not incorporate the reservations and covenants contained in that lease, but is a separate grant, and in any case it does not contain any covenant not to cut the pillars. No doubt the exceptions from the lease of 1829 are referred to in the lease of 1843, but an exception "which is ever of part of the thing granted and of a thing *in esse*," is quite distinct from a reservation, "which is always of a thing not *in esse*, but newly created or reserved out of the land or tenement demised (9)." We submit that we have not been working recklessly or improvidently, but in a proper and workmanlike manner, and that we have the right to get the coal from the mine as we best can: *Lewis* v. *Fothergill* (10); *Vivian* v. *Jegon* (11).

But if any consent to the way in which the present working has been carried on is necessary, such consent has been given. The Plaintiffs' rights are subject to those of the mortgagees in possession, *Millett* v. *Davey* (12), which cannot be interfered with without an offer by the Plaintiffs to redeem, which is not made by their pleadings. The expression in the deed of May, 1850, "the consent in writing of the said *E. M. L. Mostyn* or his assigns," was intended

(1) Ll. & G. 185; *Sugden* on Powers, App. p. 932.
(2) 2 Madd. 294.
(3) Jac. 307.
(4) Skin. 427.
(5) 5 Ves. 445.
(6) 8th Ed. p. 433.
(7) 1 H. L. C. 576.
(8) 2 Ir. C. L. 634.
(9) Co. Litt. 47 a.
(10) Law Rep. 5 Ch. 103.
(11) Ibid. 3 H. L. 285; 6 Ch. 742.
(12) 31 Beav. 470.

to include, and does include, the persons entitled as mortgagees to the mines under the deeds of 1843 and 1850, and as the persons entitled to the rents and profits under the ninety-nine years term and mortgagees of Lord *Mostyn's* life estate, the Plaintiffs in the cross action, and not the Plaintiffs in the first action, who in law are strangers to the estate without any of the rights of ownership, are the persons to exercise the power of consenting to the particular mode of working: *Smith* v. *Pocklington* (1); *Doe* v. *Adams* (2); *Rogers* v. *Humphreys* (3); *Davidson's* Conveyancing (4). We claim the right to consolidate our securities, and we say that we can only be redeemed upon payment of the whole amount due to us upon our securities (£134,940).

P. H. Lawrence, for Lord *Mostyn*, took no part in the argument.

Davey, in reply in the first action.

Marten, in reply in the second action.

BACON, V.C.:—

The most important branch of this case appears to be the first suit, in which an injunction is sought to restrain the Defendants from removing the pillars; at least it is that to which, in the first instance, I direct my observations. In order to comprehend it one should very clearly understand the subject with which we are dealing. Sir *Thomas Mostyn* being the owner of an estate, a great part of which was covered twice every day with the flowing and ebbing of the tides, has to make that available in the shape of a lease granted to the *Eytons*. I think it is necessary to attend strictly to the terms of the lease granted to the *Eytons* in order to understand the subsequent dealings with the property. That lease is full of exceptions. In the demising part of it and elsewhere exceptions are introduced, and all with one view, viz., with a view of limiting the rights and powers which the lessees were to have and enjoy, and to reserve to the grantor all that which he did not in express terms grant. I will take it up at the very beginning. There is a demise by Sir *Thomas Mostyn*

(1) 1 Cr. & J. 445.
(2) 2 Cr. & J. 232.
(3) 4 Ad. & E. 299.
(4) 3rd Ed. vol. iii. pp. 480, 491.

C. A. 1883 MOSTYN v. LANCASTER. TAYLOR v. MOSTYN. V.-C. B.

to the two *Eytons* of all those collieries then existing, or which might thereafter be opened and sunk on the marsh or waste lands adjoining, with the consent of Sir *Thomas Mostyn* his heirs or assigns as thereinafter mentioned, and the full and free liberties thereinafter mentioned are granted to the lessors subject to the provisoes, limitations, agreements, and conditions thereinafter contained. It is not necessary to enumerate all those conditions, but I find—full liberty to work during the continuance of the demise, without the consent of Sir *Thomas Mostyn*, except only such coal, cannel, and slack as may be wrought from the lands of *David Pennant*, except and always reserved from and out of the present demise unto Sir *Thomas Mostyn* all mines under the mansion-house, and except out of the present demise or lease all cannel and slack. And then the *habendum* applies itself to the things which are granted upon payment of the rents which are thereby reserved. Then the covenants on the part of the lessees are that they shall from time to time and at all times during the term work the said veins and mines in a proper and workmanlike manner, and get and clear the respective veins and mines in the best and most approved manner in which they are performed in other works of the same or like kind in the neighbourhood of the said demised premises on the River *Dee*; and shall not and will not at any time wilfully or negligently carry on or work so as to endanger the pillars or partitions between the same, or so as to let the water out of the old cobs adjoining thereto, but shall and will leave a barrier or partition of solid coal of twelve yards in breadth below any adjoining colliery except as hereinafter mentioned; and shall and will at the end of or other sooner determination of this lease leave sufficient walls or pillars for the support of the roof, and for preventing thrusts and creeps, and not remove the same without the consent in writing of Sir *Thomas Mostyn*, his heirs and assigns, for that purpose first had and obtained. I cannot, having read those words, entertain a doubt about the meaning and effect of that instrument. At the end or determination they are to leave, that is, must not in the meantime take out, because "to leave" does not assume that there will be any power to take out pillars and afterwards to restore them. It is a grant of the mines except only the pillars, and in terms so plain

that there can be no doubt as to the meaning of the words. The lessees are to work in a reasonable and proper manner. The instrument throws considerable light upon that, but they can under no circumstances remove any of the pillars which are necessary for the support of the roof, and they must at the end of the demise leave them in the same state, and not remove the same, that is, the pillars, without the consent in writing of Sir *Thomas Mostyn* his heirs and assigns. So that what was the state of things as between Sir *Thomas Mostyn* and his lessees is, in my opinion, clear beyond all doubt upon the reading of this lease. Things so standing, Sir *Thomas Mostyn* makes his will, and by his will he creates tenancies for life without impeachment of waste, and gives powers to make leases which, Mr. *Davey* has argued, are to be construed as if they were only powers for the management of the estate, a conclusion which I cannot arrive at, although I think it eminently reasonable to suppose that that was the intention of the testator. The words that he has used must be regarded, and he has given to the successive tenants for life, without impeachment of waste, power to grant leases in such terms, at such rents, and with such restrictions and agreements as to them shall seem reasonable and proper. That, it is said on the part of the Defendants, is a power which the tenant for life was entitled to exercise, and I think upon the authority of the cases which have been referred to, but much less upon the authority of *Sheehy* v. *Lord Muskerry* (1) than upon the particular terms of the instrument which I am to construe, he had that power, and he has exercised that power. The manner in which he has exercised it remains to be considered.

In the deed of 1843, which it is enough for this purpose to refer to—the grant to *Craig*—the lease to the *Eytons* is referred to in very distinct terms. It is a demise of all the collieries, pits, mines, and minerals which have been demised by the deed of the 29th of August, 1829, which I have just mentioned, and also such or the like liberties, powers, or authorities which before the said indenture of lease were granted or reserved to *Eyton*, and all other liberties, powers, authorities, and privileges whatsoever which were or should be necessary or proper for searching, raising,

(1) 1 H. L. C. 576.

C. A. 1883 MOSTYN v. LANCASTER. TAYLOR v. MOSTYN. V.-C. B.

getting, and working the collieries, pits, mines, minerals, coal, cannel, slack, and ironstone with effect, except as in the said lease was excepted. *Coke* upon *Littleton* was referred to, to shew the difference between a reservation and an exception. I rely on the words of the instrument, viz. a lease in which there are a great variety of exceptions, where the exceptions are over and over again referred to in company with the power which is granted to the lessee. When I find the words "except as in the said indenture of lease was excepted," I must include in them the restriction upon removing pillars. It is an essential part of the agreement. Not only is it essential, having regard only to the words of the agreement, but it is necessary, having regard to the substance of the thing, for if that incursion of the sea, which has been talked about so much, should take place, the consequence would be to utterly destroy the mines. Words much less extensive and much less potent than these would seem to me to imply as between lessor and lessee that the restriction was at all times to be observed, and that the grantor of the lease did not give to the lessee any power to remove pillars which were necessary for supporting the roof and preventing the thrusts and creeps which would arise if that precaution were not observed. When I recollect that this, which although it is in some sense a lease, is absolutely a mortgage, and that it is granted by Lord *Mostyn*, the tenant for life, who, whatever he grants, reserves to himself his equity of redemption, the necessity for making that restriction becomes the more powerful. But for that, the mortgagees may drown the mines, or suffer them to be drowned, and destroy the equity of redemption. Can it be said that Lord *Mostyn*, who granted this mortgage, did not mean to reserve the power to redeem? Of course that cannot be said. It is an essential part of the whole contract. When, therefore, Lord *Mostyn* makes this mortgage and lease, for it is both, to the bankers *Strahan & Co.*, he refers to *Eyton's* lease, and he says the grant shall be subject to all that *Eyton's* lease is subject to. He will grant all other powers which may be necessary for winning the coal, but that further grant, if it should become necessary, shall be subject to the exceptions in the indenture of lease excepted. It does not carry it one step further. At no part of the whole of these trans-

actions is the restraint upon the lessees to remove the pillars ever lost sight of, for when afterwards the lease is made to *Cookney*, there, in terms which I need not repeat, and which are adopted from *Eyton's* lease, is a positive restriction and obligation upon the lessees not to remove the pillars. Not attending for the moment to the various other topics which have been argued before me, I find that a tenant for life without impeachment of waste grants a lease, and grants it in terms by reference to an existing lease subject to all the obligations of the existing lease upon the lessee, and although he promises and undertakes to give all further powers necessary for working the coal, yet he will only do that subject to the exceptions contained in the lease. That the restriction therefore is reserved is plain, and if a reason is necessary to be assigned, the reason is this: A mortgagor who is dealing with the property in the way I have described must be desirous of preserving his equity of redemption, and therefore he puts that in *Cookney's* lease. The exception of the deed of December, 1843, is enough for the purpose I have mentioned, but when he comes to make *Cookney's* lease, then in very express terms there is an obligation imposed on the lessee not to remove the pillars without the consent of the grantor or his assigns. Did he assign any part of his equity of redemption? His equity of redemption remains here, and the consent which he requires is a personal consent, personal while he chooses to exercise it. If he assigns after this mortgage, what is he to assign but his equity of redemption, the very thing which would be placed in imminent peril but for the protection which is given by the terms of the instruments themselves. Upon the construction of the instruments, therefore, I entertain no doubt that the obligation contained in *Eyton's* lease is repeated in the deed of the 8th of December, 1843, for no more than *Eyton* had is granted by that last-mentioned deed, and in *Cookney's* deed it is beyond the possibility of question that the terms between the lessor and lessee are that you the lessee, shall at your good pleasure work and get all you can, but this one thing you shall never do, you shall never remove the pillars without my personal consent. That it must be personal, as I have said, I entertain no doubt, because it was for the protection of his equity of redemption, which, but for that

C. A.
1883
MOSTYN
v.
LANCASTER.
TAYLOR
v.
MOSTYN.
V.-C. B.

protection, might have been rendered worthless by the action of the lessee. So much for the law, which in my opinion is a most important branch of the case.

Upon the evidence, assuming that all the opinions of the Defendants' witnesses were well founded, there is no answer to the contract. If the opinions which are ventured by the Plaintiffs are well founded then the danger is imminent, and who can take upon himself to say—not I for one—with these hundreds of acres of shifting sands covered twice a day by the tides flowing and ebbing, what may happen in the course of nature upon that enormous surface and at that great depth which exists here? Nobody would dispute that if the water gets into the mine the mine is drowned. Nobody can deny that there is a possibility that the water may get in under the most careful working. Nobody can deny that if the pillars are removed, not only *de facto*, as I have a right to assume by the evidence on both sides, but according to the terms of the contract between the parties, that thing will be done which Sir *Thomas Mostyn* endeavoured to guard against, and which the mortgagor, Lord *Mostyn*, endeavoured, I think effectually, to guard against when he made the mortgage and the lease. [His Lordship after observing upon portions of the evidence proceeded:—] What I have to deal with is the original owner of the property saying, "You shall not remove the pillars," and the man who becomes the next owner of it and who is granting this property says, "I grant you all my interest subject to a proviso for redemption, but you shall not remove the pillars." These present Defendants, who hold a very recent lease of 1880, say that they have a right to remove the pillars because their lessor authorizes them to do so. If their lessor has no power to authorize them, of course that is no answer. That their lessor had no power to do so I am satisfied upon the true construction of the documents and upon the evidence of the facts. I think the Plaintiffs, therefore, are clearly entitled to the injunction they ask for in the first suit.

The second suit (*Taylor* v. *Mostyn*) stands upon totally different grounds. I cannot doubt that Lord *Mostyn*, as tenant for life without impeachment of waste, had the right to grant a ninety-nine years lease. I do not feel any doubt that he had the right

to charge it with £6000 in the first instance, and a right to charge it with the larger sum in the second. I think the mortgages are very good mortgages for the ninety-nine years term. The decree therefore in the second suit must be that which the Plaintiffs have asked—an account of what is due to them, and redemption or foreclosure. I think that as there was a policy of assurance mentioned as part of the securities there ought to be an inquiry as to what has been done with that policy of assurance, because if redemption takes place and the policy is in existence and has been kept up, the mortgagors, the persons entitled to the equity of redemption, would be entitled to the benefit of that policy.

As to the argument which has been addressed to me upon the suggestion that the persons entitled under the lease of 1850 or under the mortgage of 1850 were the persons who were entitled to consent, there is not the shadow of a ground for it. The consent was to be given by the man whose property was to be injured. The owner of the equity of redemption was the only person who could give the consent. I think, therefore, that the suggestion of the Defendants in the first suit that they had a right to give the consent is wholly without foundation.

The judgment will be this: Injunction with costs in the first action, and in the second a declaration that by the indenture of the 8th of December, 1843, a valid lease of the mines, &c., was granted for the term of ninety-nine years; the ordinary foreclosure decree as in the case of mortgagees in possession, with an account as for wilful default with annual rests, and an inquiry, without prejudice to any question as to the policy of assurance mentioned in the deed of December, 1843.

F. G. A. W.

The appeals came on for hearing on the 17th of April, 1883. C. A.

Davey, Q.C., and Sir *A. T. Watson*, for the Appellants in *Taylor* v. *Mostyn* and the Respondents in *Mostyn* v. *Lancaster*:—

In the action of *Taylor* v. *Mostyn* we contend that the deed of 1843 was not a good exercise of the leasing power, and affected nothing but Lord *Mostyn's* life estate, and that if it was good the

C. A. 1883 MOSTYN v. LANCASTER. TAYLOR v. MOSTYN.

estate created by it is charged with nothing more than the original £6000.

As to the first point, the power of granting mining leases comes between a power of granting ordinary leases for twenty-one years and a power of granting building leases. *Noscitur a sociis;* it is a power for the better management of the estates, and is not to be allowed to operate so as to defeat the objects of the settlement. It was given for the purpose of developing the mines, not for the purpose of enabling the tenant for life to get the whole value of them. The power is also given to the guardians of an infant tenant for life; if then the power is one to be exercised without regard to the interests of the remainderman, it would be the duty of the guardians to exercise it to its full extent so as to give the whole value of the mines to the infant's estate. It was, no doubt, intended, having regard to the nature of the property, to give the tenant for life a wide discretion, but still it was a discretion to be exercised with a view to the objects of the settlement and the interests of all parties claiming under it. The object of powers of management of this kind is well stated in *Hill* v. *Hill* (1). *Muskerry* v. *Chinnery* (2) appears to be against us, but the judgment of Lord *Cottenham* (3) makes an exception which covers this case. There were there no words which could be treated as imposing on the donee any obligations as to the propriety of the leases. The observations of Lord *St. Leonards* (4) are important as to this. *Talbot* v. *Tipper* (5), which was relied on against us, is very shortly reported. The power there was reserved to the settlor, and the Court thought that "as he shall think fit" gave him an unfettered discretion.

[FRY, L.J.:—Do not the words here come to the same thing?]

No. "Reasonable and proper" implies a reference to a standard; "as he shall think fit" means "as he pleases." *In re Molton* (6) was relied on below, but it went on the special wording of the power, which shewed that it was to be exercised for the

(1) 6 Sim. 136.
(2) Ll. & G. temp. Sugden, 185; S. C. *sub nom. Sheehy* v. *Lord Muskerry*, 1 H. L. C. 576.
(3) 1 H. L. C. 591.
(4) Ll. & G. 220.
(5) Skin. 427.
(6) 2 Ir. C. L. 634.

donee's own benefit. *Vivian* v. *Jegon* (1) has no close bearing on the present case, except that it shews that in construing a power of this kind the whole instrument must be looked to if there is any ambiguity in the terms of the power. The cases of *Attorney-General* v. *Wray* (2) and *Attorney-General* v. *Moses* (3) were referred to below, but do not touch the point. They only decided that the leases being good at law could not be impeached by the Attorney-General as being improvident.

[FRY, L.J.:—The power here being to grant such leases as the donee thinks reasonable and proper, which makes him the judge, is it not necessary for you to shew that no reasonable man could think this deed reasonable and proper? Suppose the tenant for life had expended £6000 in exploring the mines.]

There was no exercise of discretion, and the circumstances negative any expenditure for the benefit of the estate. The power was given to provide for the mines being worked. But when this deed was executed the mines were being worked under *Eyton's* lease; this deed only dealt with the reversion, and its object was not to enable the mines to be worked, but to put money into the pocket of the tenant for life. On the face of the deed the money appears to be raised for the benefit of Lord *Mostyn*, and it lies on the other side to shew that it was expended for the benefit of the estate. This really is not a lease at all; it is a startling thing to say that a power to lease includes a power to make a mortgage. It is not within the power at all—a lease at a fine is quite another thing. There is no covenant to work the mines, and it was never intended that the so-called lessees should work them. Again, assuming the power to have been exercised properly, Lord *Mostyn* could not without a fresh exercise of the power charge other debts on the term. Suppose a power to grant leases at the best rents, a lease is granted, and then rents fall, we say the tenant for life could not alter the rent. Whether he could accept a surrender and grant a fresh lease is another question. It has been suggested that there is a resulting trust of the term for Lord *Mostyn*, but that is not so; the proviso

(1) Law Rep. 3 H. L. 285. (2) Jac. 307.
(3) 2 Madd. 294.

C. A. 1883

MOSTYN v. LANCASTER.

TAYLOR v. MOSTYN.

is for making void the lease on payment. It is true that would only operate at law if payment were made on the day, but it makes the equity of redemption follow the inheritance, and Lord *Mostyn* could not modify the rights of the remainderman in the equity of redemption without a fresh exercise of his power.

Now as to the deed of the 26th of April, 1850, we submit that it shews no intention to charge the term with anything more than the sum originally charged on it. *Williams* transfers to *Strahan, Paul, & Bates,* subject to the existing equity of redemption, Lord *Mostyn* not granting but only joining as an approving party. Then by the next witnessing part Lord *Mostyn* assigns to *Cookney* the colliery comprised in the former deed for all Lord *Mostyn's* estate without the least indication of an intention to exercise the leasing power. Then there is an assignment of chattels, and the form of the proviso for redemption shews that it was not intended that the term should be included. It does not provide that *Strahan, Paul, & Bates* shall re-assign, but that *Cookney* shall re-assign the premises hereby mortgaged—that is the estate for life and the chattels. Then the power of sale is not vested in *Strahan, Paul, & Bates,* but in *Cookney,* which is reasonable as to the life estate and chattels, for they had been conveyed to him, but he could not sell the term. This shews that the term was not included in the mortgage for the larger sum. There is then no contract to consolidate the mortgages, and the case is not one where apart from special contract there would be consolidation under the general law. Special contract to that effect there is none. In order to establish it there must be something like a fresh exercise of the power, but there clearly is no new term created, nor is there any recital shewing an intention to exercise the power. If there had been such an intention Lord *Mostyn* would have joined to demise. We say then that the term in the mines created by the lease of 1843 was not charged with anything but the original £6000, and that the judgment in *Taylor* v. *Mostyn,* which proceeds on the principle that the debts are to be consolidated, ought to be varied.

The injunction in *Mostyn* v. *Lancaster* ought to be supported. The underlease, which is so framed as to allow the pillars to be worked, is prohibited by the covenants in the leases of 1843 and

1850 unless an effectual consent has been given. But it was not the lessees or mortgagees that could give the consent; the power to consent was vested in Lord *Mostyn* or other the persons entitled to the equity of redemption: *Pugh* v. *Heath* (1).

[FRY, L.J.:—I presume you do not say that he could consent as against his mortgagees.]

No; he could not consent so as to prejudice his mortgagees—they must concur: *Simpson* v. *Bathurst* (2); *Alexander* v. *Mills* (3). A great deal of evidence was gone into as to whether removing the pillars would do any harm, and it is very conflicting. Whether removing the pillars would do harm or not is not the question, if there is a binding covenant not to remove them they of course must not be removed, though their removal might do no harm, and we only refer to the evidence to shew that the injunction was not applied for vexatiously. The covenants contained in *Eyton's* lease to leave pillars, &c., are imported into the lease of 1843. It was contended that the latter deed did not incorporate the restrictive covenants in *Eyton's* lease but only the exceptions properly so called. It is clear, however, that the deed of 1843 intended to incorporate everything in the lease of 1829 which was therein called an exception. But if the Court differs from the Vice-Chancellor on that point, we rely on the covenant in the lease of 1850, which prohibits the removal of pillars without the consent of Lord *Mostyn* or his assigns. The other side say that the mortgagees are his assigns and are the persons to consent. If so, as *Cookney* is merely a trustee for them, the mortgagees will be giving a consent to themselves, which is not a reasonable contention. Lord *Mostyn* is the lessor in the lease to *Cookney*, and the power of consenting must be vested in Lord *Mostyn*, or his assigns who became such by subsequent alienation.

Marten, Q.C., *Finch*, and *John Dixon*, *contrà*:—

In *Taylor* v. *Mostyn* there are three questions: 1. Whether the power authorized the deed of 1843; 2. Whether it was competent

(1) 7 App. Cas. 235. (2) Law Rep. 5 Ch. 193.
(3) Law Rep. 6 Ch. 125.

C. A. 1883 MOSTYN v. LANCASTER. TAYLOR v. MOSTYN.

to Lord *Mostyn* in 1850 to increase the burden on the term, and if so, then, 3. Whether he did so.

As to the first point, it is said that the power must be confined, because it is associated with powers which clearly are confined. The answer to that is that when it was intended to limit the powers the limitation was plainly expressed. The case is governed by *Sheehy* v. *Lord Muskerry* (1), and *Talbot* v. *Tipper* (2). The other side wish to import the condition that the leases shall be reasonable, but that is not what the power says. There is no indication of intention that anybody's opinion as to reasonableness is to be looked to except that of the donees of the power. "Fit" is synonymous with "proper," *Johnson's* Dict., and "proper" was the word in *Talbot* v. *Tipper*. The fact that an annuitant joined in the deed of 1843 to postpone his annuity is evidence that the deed was reasonable, but in fact the power amounts to a power to dispose of the mines for a term in any way the donee of the power chooses. The words "for the purpose, &c.," must refer to the surface lands not to the minerals, for a lease of mines cannot but be for the purpose of working them. But suppose the words do refer to the mines, this deed is a lease for the purpose of working the mines. It is true that as it was a reversionary lease there could not be any immediate working under it, but on the expiration of *Eyton's* lease the grantees could enter. It has been urged that in the cases referred to the power was reserved to the settlor, and therefore was construed widely, but the origin of the power cannot affect its construction: *Attorney-General* v. *Moses* (3); *Attorney-General* v. *Wray* (4). It has been said that a leasing power must be exercised absolutely and not subject to a proviso for redemption, but in *Sheehy* v. *Muskerry* a power to surrender was held not to affect the validity of the lease, and if the donee may create an absolute term he may do less. The tenant for life may exercise such a power with a sole view to his own benefit so long as he keeps within its terms: he is not a trustee of it: *Bevan* v. *Habgood* (5). That there is no covenant to work the minerals is no objection, if they

(1) 1 H. L. C. 576.
(2) Skin. 427.
(3) 2 Madd. 294.
(4) Jac. 307.
(5) 1 J. & H. 222.

are not worked the remainderman will get them, for he can redeem at any time.

Then as to the effect of the deed of April, 1850, there is a declaration that all the premises shall be subject to the proviso for redemption, which is on payment of the whole sum due, not merely the £6000.

[BAGGALLAY, L.J.:—Are you not adding a further charge on the term without any fresh exercise of the leasing power?

FRY, L.J.:—May it not be held a fraud on the power if the tenant for life lets in a charge not made for the purpose of getting the mines worked but merely for his own benefit?]

If we are right in our contention that the tenant for life can exercise the power for his own benefit there is no fraud in it. The power is recited in the deed of April, 1850, and effect will be given under the power to every disposition which could be made under it, whether it is formally referred to in the witnessing part or not: *Bac.* Abridgment, Leases K (1). In *Sheehy* v. *Lord Muskerry* (2) an argument founded on the want of express reference to the power was overruled.

Then as to *Mostyn* v. *Lancaster*, the lessees are in possession and working under the authority of Lord *Mostyn's* mortgagee. Lord *Mostyn's* life estate was unimpeachable for waste, so his mortgagee can work the mines: *Millett* v. *Davey* (3). Mr. *Mostyn's* trustees, therefore, cannot sue by virtue of the estate which they derive from Lord *Mostyn*, nor can they as remaindermen interfere with working by the assign of a tenant for life not impeachable for waste. Their combining the two interests cannot make their case any better.

[FRY, L.J.:—*Cookney* was under a covenant not to get pillars.]

Yes, as lessee, but that does not affect the rights of the mortgagees as such. Then we say that the lease of December, 1843, does not incorporate the covenants in the lease of 1829. The word "exceptions" must be taken in its strict sense. Then the power to consent follows the immediate reversion, just as in *Greenaway* v. *Hart* (4) rent was held to follow the reversion,

(1) Vol. iv. p. 816.
(2) 1 H. L. C. 576.
(3) 31 Beav. 470.
(4) 14 C. B. 340.

C. A. 1883 MOSTYN v. LANCASTER. TAYLOR v. MOSTYN.

though it was in terms reserved to the lessor, his heirs and assigns. The entry vested the legal estate in the mortgagees: *Doe* v. *Adams* (1). The mortgagees are the persons who could accept a surrender, and they are the persons to consent; the consent to the removal of the pillars being a matter of management which must depend on the immediate reversioner.

Davey, in reply, in *Taylor* v. *Mostyn*:—

When we say that the rule *noscitur à sociis* applies to the power of granting mining leases, we do not mean to say that all the limitations in the other powers are to be imported into it, but that where there is anything ambiguous in the terms of the power regard is to be had to the other powers in construing it. There is an ambiguity arising from the words "for the purpose," and it is more conformable to the context to read them as referring to the mines than to the parcels of surface land. Then an ambiguity arises from the fact of the power being given to the guardians of an infant.

[FRY, L.J.:—Is it not against you that the power is thus given to persons who owe no duty to the estate but only to the tenant for life?]

We say, on the other hand, that it is very improbable that the testator meant to give the guardians of an infant tenant for life power to destroy the settled property. The deed of 1843 was not a lease for the purpose of working the mines, the lessee is put under no obligation to work, and Lord *Mostyn* covenants to grant further leases to enable the grantee to work. The terms of the appointment of a receiver tend the same way. It really is not a mining lease at all. Then as to the deed of April, 1850, the proviso for redemption, if carefully examined, will be seen not to apply to the term. If it was intended to charge the term, why was Lord *Mostyn's* life interest conveyed when the mortgagees had already got a term which must last beyond his life?

1883. May 9. FRY, L.J.:—

Although the facts in these cases are not in dispute, it is necessary shortly to refer to them in order to make the judgment I am about to pronounce intelligible.

(1) 2 Cr. & J. 232.

C. A.
1883
MOSTYN
v.
LANCASTER.
TAYLOR
v.
MOSTYN.
Fry, L.J.

In the year 1831 Sir *Thomas Mostyn* died seised of considerable landed estates in *North Wales*, a portion of which consisted of coal mines in and under the estuary of the *Dee*. He had made his will in the year 1818 and republished it in 1826, and had thereby devised his real estate to the present Lord *Mostyn* for life, with remainder to his first and other sons in tail, and had given the usual powers which are incident to a strict settlement of real estate, including powers of charging portions, raising jointures, and so forth. He had in the year 1829 made a lease of these coal mines to two gentlemen of the name of *Eyton* for a term of twenty-one years, which commenced on the 31st of December, 1827, and therefore expired in December, 1848. In that lease there were contained certain restrictions with regard to leaving pillars to support the roof, to which it will be necessary hereafter more particularly to refer. On the death of Sir *Thomas Mostyn* the present Lord *Mostyn* entered into possession as tenant for life, and on the 8th of December, 1843, he made a mortgage by way of demise to the Rev. *James Craig*. That mortgage purported to be made in exercise of a power of leasing contained in the will of Sir *Thomas Mostyn*. The first question which will arise for decision in this case is as to the validity of that mortgage as an exercise of the leasing power. The mortgage was made by creating a term for ninety-nine years from its date at a peppercorn rent, with a proviso for cesser on payment of £6000 and interest, and powers of working were granted by reference to the lease of 1829. In this indenture of 1843 there was contained a covenant for further assurance, with a particular provision that Sir *Thomas Mostyn* would grant other leases in case he was required so to do by the mortgagee. Before April, 1850, *Craig* had died, and his executors had transferred the mortgage of 1843 to a gentleman of the name of *Wynne Williams*. It appears that the moneys due on the mortgage then amounted to £7800. It further appears that at the same time Lord *Mostyn* was indebted to his bankers Messrs. *Strahan, Paul, & Bates*, to the amount of £59,741. Whether he had become so indebted in respect of money laid out in the exploration of the mines, or in assistance rendered to the lessees or otherwise, does not in any way appear. It further appears that at this time an agree-

C. A. 1883 MOSTYN v. LANCASTER. TAYLOR v. MOSTYN. Fry, L.J.

ment was entered into that Messrs. *Strahan, Paul, & Bates* should pay off Mr. *Wynne Williams*, and that a mortgage should be executed to secure the entire balance, and whether the security to which I am about to refer was given for the entire balance, is a question in dispute. Accordingly, on the 26th of April, 1850, a mortgage was made of a somewhat complicated character. Mr. *Williams* transferred his mortgage debt to Messrs. *Strahan, Paul, & Bates*. He also transferred the hereditaments comprised in the mortgage of 1843 to the same gentlemen, subject to the equity of redemption subsisting under the deed of 1843. Lord *Mostyn* assigned his life interest, subject to a new proviso created by this deed, to a gentleman of the name of *Cookney*, who was a trustee for *Strahan, Paul, & Bates*, and certain chattels were also assigned by Lord *Mostyn* to Mr. *Cookney* with similar provisions. I shall hereafter refer to the details of that deed.

On the 10th of May, 1850, Lord *Mostyn*, again exercising the power of leasing contained in the will of Sir *Thomas Mostyn*, demised the mines to *Cookney* for the term of forty years, subject to a dead rent of £1500 and royalties. The deed was in fact an ordinary working lease, and it contained certain provisions with regard to the pillars. The object of that lease is apparent. It was evidently intended that Mr. *Cookney* should either himself work the mines, or that he should assign them to some person who would work them, and then the rents and royalties payable under the lease of May, 1850, would be received by the mortgagees under the mortgage of the 26th of April, 1850. The one instrument would therefore be subject to the equity of redemption and the other instrument would not. The lease of 1850 was confirmed by Mr. *Mostyn*, the eldest son of Lord *Mostyn*, who had then attained his majority, and had barred the entail created by Sir *Thomas Mostyn's* will, and by the same instrument Mr. *Cookney*, in consideration of the confirmation by Mr. *Mostyn*, entered into covenants with Mr. *Mostyn* to observe the covenants contained in the deed of the 10th of May, 1850. On the 29th of May, 1854, Lord *Mostyn* mortgaged his life interest to his son Mr. *Mostyn*. Mr. *Mostyn* died in 1861, having devised and bequeathed the whole of his property to the Plaintiffs in the action of *Mostyn* v. *Lancaster*, and subsequently, in the year 1869, Lord *Mostyn* released

his equity of redemption in his life estate to the same persons. The Plaintiffs in that action therefore, now represent the entire interest of Lord *Mostyn*, subject to the mortgages which he had created, and the interest also of Mr. *Mostyn*, the tenant-in-fee in remainder.

As regards the interests of the Defendants in that action, it appears that on the 12th of June, 1880, an assignment was made of this description. The mortgage debts secured by the mortgages of 1843 and 1850, which were then recited to amount to the sum of £134,940, were assigned to a gentleman of the name of *Robert Lancaster* in trust for the three persons beneficially interested under these instruments, namely, *John Taylor*, *John Lancaster*, and *Thomas Part*. The term of ninety-nine years created in the collieries by the instrument of 1843 was assigned to a gentleman of the name of *Henry Enfield Taylor*, who is also a trustee for the same persons. The mortgage on the life interest of Lord *Mostyn* was assigned to *Robert Lancaster* in trust for the same three persons, and lastly, the lease of May, 1850, which is what I have called the working lease, was assigned by Mr. *Cookney*, or those who represented him, to the three beneficial owners, *John Taylor*, *John Lancaster*, and *Thomas Part*. They therefore had become the assigns of the working lease, and had taken to trustees for themselves assignments of the other mortgaged property. In the same year, on the 17th of December, the three beneficial owners, as I have called them, executed an underlease to the Defendants in the action of *Mostyn* v. *Lancaster*, viz., *Joshua Lancaster* and *Thomas Storey*, for the residue of the term of forty years created by the indenture of May, 1850, less one day; and by the same deed *Henry Enfield Taylor*, as assignee of the ninety-nine years' term, and *Robert Lancaster*, as assignee of Lord *Mostyn's* life interest, demised to the same parties for a term expiring in 1900, and there was a covenant contained in that lease not to work the pillars above a particular level known as the 130 yards level. It must be taken, therefore, that by that instrument the three persons who had become beneficially interested in the mortgages licensed their sub-lessees to work the pillars below the 130 yards level. I have now stated the title of the litigant parties before the Court.

C. A.
1883
MOSTYN
v.
LANCASTER.
TAYLOR
v.
MOSTYN.
FRY, L.J.

Two actions have been brought, the one by the persons beneficially interested in the mortgage securities for the foreclosure of those mortgage securities, and the other by the trustees of Mr. *Mostyn* to restrain the under-lessees from working the pillars which they threaten and intend to work. Two judgments have been pronounced by the learned Vice-Chancellor from whom this appeal is brought, and by the judgment in the case of *Taylor* v. *Mostyn* the Vice-Chancellor declared that by the indenture of the 8th of December, 1843, a valid lease of the collieries, mines, and premises comprised therein was granted for a term of ninety-nine years, and that the term thereby created was subject to the payment of all moneys due on the security of the indenture of mortgage of the 26th of April, 1850. By the judgment pronounced in the other action he restrained the Defendants in that action, viz., the sub-lessees, "from working, removing, or injuring any of the pillars and walls of coal heretofore left for the support of the roof of the mines in the collieries known as the *Mostyn* collieries, and from working any mines in the said collieries without leaving substantial, good, and sufficient walls and pillars for the support of the roof, and for the preventing of thrusts and creeps." From both those judgments appeals have been brought, and the judgment I am about to pronounce deals with both those appeals.

The first question which arises for determination is whether the deed of the 8th of December, 1843, is a valid exercise of the power of leasing mines contained in Sir *Thomas Mostyn's* will, or is valid only for the life of Lord *Mostyn*. To answer that question we must consider in the first place the terms of the power contained in Sir *Thomas Mostyn's* will, and in the second place the terms of the instrument which purports to exercise it. As I have already mentioned, Sir *Thomas Mostyn* created an ordinary strict settlement of his real estate, and by that will he conferred the usual powers of raising portions and creating jointure charges. But in addition to those there were three powers of leasing which are found together and which I am now about to read. [His Lordship read the three powers.] There are it will be observed three distinct powers, the one is the ordinary power of granting leases for twenty-one years, the next is the power of leasing the collieries, the third is the power of granting

building leases, and it is on the second of those powers that the question turns.

Now in the first place it is necessary to look at the power itself, and looking at that power I am struck with this, that there is no limitation whatever as to the term of years or as to the conditions to be imposed, but everything is left to the discretion of the tenant for life or guardian or guardians. Every lease is to be for such term or number of years, and under and subject to such rents, reservations and agreements as to such tenant for life or guardian or guardians shall seem reasonable and proper. The donee of the power is therefore the absolute judge of what is reasonable and proper, and what he deems to be reasonable and proper is within the power. In the next place we must consider whether there is anything whatever to limit the generality of the language used by the testator. There is one clause which has been insisted upon as defining the purpose for which the power is to be exercised—the words "for the purpose of digging for, winning or gaining any ore, minerals, or coal in any part of my said estates." But it appears to me that according to the true construction of the power, those words are not a limitation on the power generally, but are only a limitation on the power so far as it relates to any parcel or parcels of land. I come to that conclusion for two reasons. In the first place it appears to me more probable that such a limitation would be expressed in regard to parcels of land which might include land outside the operation of any colliery lease, than that it should be applied to a power which is obviously intended to enable the collieries to be worked. In the next place it is to be observed that the testator has repeated the word "of" in a manner which seems intended to separate the parcel or parcels of land from the previous description of property, and to shew that the power of leasing land in this way was limited, he adds the words "for the purpose of digging" to the words "parcel or parcels of land." The power is to grant any lease or leases of any mine or mines, or quarry or quarries, colliery or collieries—or of any parcel or parcels of land for the purpose of digging for, winning, or gaining any ore, minerals or coal in any part of my said estates. This enables the donee of the power to grant a lease of any parcel of land wherever

C. A. 1883

MOSTYN v. LANCASTER.

TAYLOR v. MOSTYN.

FRY, L.J.

situate, provided only it is required for the purpose of gaining coals or minerals on any part of the estate. It appears to me, therefore, that those words do not put any limitation upon the generality of the power to demise the mines.

In the next place it must be inquired whether the association of this power with the more limited powers which precede and follow it places any limitation upon it. In my judgment there is nothing whatever in the position of the power to create any limitation of it. We are asked to infer that because it comes between two powers of management it must be a mere power of management, and ought therefore to be confined by being treated as exercisable only for the benefit of the persons successively taking the estate. But it appears to me that the proximity of that power to others which are so differently expressed only emphasizes the difference between those powers and the one in question. The first and third powers are confined as to the terms of years. They are confined as to the nature of the rent to be reserved. The second power is neither confined as to the term of years nor as to the rent to be taken. Nothing could have been easier if the testator had been so minded than to say that the lease should be granted at the best rent. I think that therefore we should be doing violence to the language of the testator if we put any limit upon this power, or held that it could not be exercised by the tenant for life or guardian or guardians in any manner which such tenant for life or guardians should think reasonable and proper. It has been admitted that the tenant for life could under this power take a fine, but it has been said that the fine must be a reasonable one, and that he must have regard to the interest of other persons claiming under the settlement. It appears to me that when once it is conceded that the tenant for life may benefit himself by taking a fine it is impossible for the Court to put any measure on the extent to which he may benefit himself. He is made the judge of what is reasonable and proper, and the Court cannot enter into the question.

It further appears to me that the point is decided by *Sheehy* v. *Lord Muskerry* (1). In that case no doubt the power was to grant such leases as the donee of the power should think fit, and

(1) Ll. & G. temp. Sugd. 185; 1 H. L. C. 576.

it has been contended that whilst the words "he should think fit" import an arbitrary power, the words "as shall seem reasonable and proper" import only a discretion regulated by the interest of the other persons taking under the settlement. I think there is no real distinction between the two expressions, but that "what he shall think fit" is only another expression for "what he shall think reasonable and proper." In that case Lord *St. Leonards* pointed out the great difficulty in imposing terms on an arbitrary power. He said (1): "I must say that I think Courts of Law and Equity have very often been mis-spending their time in seeking to introduce qualifications where parties have used general expressions and not taken the trouble to explain the intention to use them in a restricted sense. If I am to restrain this power at all, will anybody point out how far I am to restrain it? Where is the limit to be? The term may be 10,000 years and the rent may be a peppercorn, and where is the line to be drawn as to the amount of the fine? I see none. I think there is no power in this Court to cut down this power. There is nothing to guide me except what appears on the face of the instrument, and therefore I am of opinion that this general leasing power must, both at law and in equity, have its full force and operation." When the case came before the House of Lords Mr. Baron *Alderson*, in delivering the opinion of the Judges who were consulted, said (2): "There is no case, we believe, to be found in our books, in which a lease conformable to the literal tenor of the words in which the power is given has been held invalid at law, on the ground of any supposed or real hardship thereby inflicted on the remainderman; and it would be strange if such a case could be found, for as the remainderman takes what is given to him subject to the power, he must take the advantage *cum onere*, and has no reasonable ground for complaint if that should happen which the framer of the power, who had the *jus disponendi*, contemplated." No doubt he also added: "In all cases in order to determine what is the real meaning of the words of the power itself, it must be competent for the Court to look to the whole instrument in which it is found, and to examine and consider the consequence to the remainderman and to the other objects of the deed, for the purpose, if the words be

(1) Ll. & G. temp. Sugd. 225. (2) 1 H. L. C. 584.

C. A. 1883 MOSTYN v. LANCASTER. TAYLOR v. MOSTYN. Fry, L.J.

ambiguous, of adopting that construction of them which may produce the least inconvenience and best harmonize with all the other provisions which the parties have thought proper to make." And it has been urged upon us in the present case that there is such ambiguity as ought to induce us to restrain the power so as to have regard to the interests of the remaindermen. I see no such ambiguity in this power as will enable us to put any fetter upon what appears to me to be the meaning of the words used. The power was exercised by the instrument of 1843, by which the tenant for life, Lord *Mostyn*, made a mortgage to the extent of £6000 and created a term for the purpose of securing that sum. It appears to me that the tenant for life has declared that in his judgment it was reasonable and proper that that £6000 should be charged upon the minerals. Is it for this Court to say it was not reasonable and proper? I think not, and I am of opinion that the deed of 1843 is a valid exercise of the leasing power contained in Sir *Thomas Mostyn's* will.

The second question is whether the consolidating mortgage of the 26th of April, 1850, is a good exercise of this power contained in Sir *Thomas Mostyn's* will, so as to make the term of ninety-nine years redeemable only upon payment of the total amount secured by that mortgage. I have already stated generally the provisions of the mortgage, and the first question which arises is whether looking at that instrument there is an intention to charge the whole £67,000 upon the term of ninety-nine years. As I have already said the mortgage debt of 1843 is assigned by Mr. *Williams* to Messrs. *Strahan, Paul, & Bates*, and the property comprised in the mortgage is assigned to them subject to the equity of redemption created by the deed of 1843. Then in the deed of 1850, after the assignments, is to be found this proviso. [His Lordship here read the proviso which is set out *in hæc verba* above, and stated the effect of the proviso for redemption which followed it.] Now it appears to me to be clear that the declaration which precedes the proviso for redemption has this operation, that whereas the property comprised in the mortgage of 1843 had been originally assigned only subject to the equity of redemption under the deed of 1843, it is now made subject to the proviso for redemption contained in this deed. The collieries and property

assigned to *Strahan, Paul, & Bates* can mean nothing but the term of ninety-nine years, for no other collieries were assigned to them. It appears to me, then, that to hold that the term comprised in that mortgage was not intended to be charged with the entire debt would be to give no meaning to that declaration. It is further to be observed that the proviso for redemption contemplates a re-assignment being made by *Cookney* with Messrs. *Strahan, Paul, & Bates*, who are the very persons to re-assign that property. I think, therefore that the intent of the deed to charge the entire property with the entire amount is sufficiently apparent.

Then arises the question whether that is a good exercise of the leasing power contained in Sir *Thomas Mostyn's* will? It must be borne in mind that Sir *Thomas Mostyn's* will, and the particular power in question, are recited in that instrument. It appears to me, therefore, that there is a plain intention to effect by that power, if necessary, everything that the deed intends to do, and that consequently there is a good exercise of the leasing power by varying the proviso for redemption which had been created by the deed of 1843, and by substituting for that proviso the proviso comprised in the deed of 1850. If it were a defective exercise of the power, then it appears to me that as it was for valuable consideration the defect could be made good and ought to be made good in a Court of Equity. Therefore either the exercise of the power is sufficient, or it is only defective in a manner which can and ought to be made good. The decision of those two questions determines the first appeal, and leads to the conclusion that that appeal must be dismissed with costs.

The third question which arises has reference to the action brought by Mr. *Mostyn's* trustees against the sub-lessees who are now in possession. It is this. Can the Defendants, during the subsistence of the lease of the 10th of May, 1850, work the pillars? That lease, as I have already mentioned, expires in the year 1890. In order to answer that question it is of course necessary to refer to the deed of May, 1850, and to consider what are the provisions therein contained. It appears to me that the whole question turns upon the instruments, because, if there be an express contract not to work these pillars, the Court has

C. A.
1883
MOSTYN
v.
LANCASTER.
TAYLOR
v.
MOSTYN.
Fry, L.J.

nothing to do with the safety or the danger of working. The injunction is sought, not upon any ground of that description, but because it is said that an express contract has been entered into which prevents these pillars from being worked. I have already referred to the general nature of the working lease of 1850, and I find that Mr. *Cookney* entered into the usual covenants for working, and that amongst those covenants was this, a covenant that he "shall and will leave in good repair all underground roadways and air-courses to all unwrought coals in the said mines, and also that the pillars of coal to be left in working the said mines for the support of the roofs of the coals therein, shall not be worked or wrought without the consent in writing of the said Lord *Mostyn* or his assigns, or other the person or persons entitled as aforesaid, first had and obtained." The "person or persons entitled as aforesaid," appear, by referring back, to be the person or persons for the time being entitled to the said mines, land, and premises hereby demised." Then there is a further covenant, also by Mr. *Cookney*, that he "shall and will at all times during this demise leave substantial good and sufficient walls and pillars for the support of the roof and for preventing of thrusts and creeps, and not remove the same or any part thereof without the consent in writing of the said *Edward Mostyn*, Lord *Mostyn*, or his agents, or other the person or persons for the time being entitled to the mines, lands, and premises hereby demised, for that purpose first had and obtained." The covenant appears to be a very strict one. Certainly if it is enforced it will prevent the works proposed to be carried on by the Defendants. The contention on their part is this, that a written consent was to be given by Lord *Mostyn*, or his assigns, and that by the deed of April, the deed of the preceding month, Lord *Mostyn* had assigned his life interest to Mr. *Cookney*, and that therefore Mr. *Cookney* himself, the lessee in the lease of May, 1850, was the person who was to give the consent to his own working of the pillars. It appears to me that this contention is entirely unfounded, and that Lord *Mostyn* is *persona designata* in that covenant, and that the consent which will enable the lessee to work the pillars must be the consent either of Lord *Mostyn* or of his subsequent assigns. Now, in the present case, he has assigned his life interest to the represen-

tatives of his son, and although there is a prior mortgage subsisting upon it, it appears to me plain that every person who claims by assignment subsequent to the 10th of May, 1850, must give a written consent before the sub-lessees under the lease of May, 1850, are entitled to work the pillars. No such consent has been given. Consequently I hold that the injunction must go, at any rate during the subsistence of the term created by the indenture of the 10th of May, 1850.

The fourth question that arises is this. Can the Defendants work the pillars during the term created by the lease of 1843 after the year 1890 when the lease of 1850 expires? The answer to that question depends upon different considerations. It depends upon the consideration of the lease of 1829 and the lease of 1843, because the lease of 1843 refers to the lease of 1829. Now what says the lease of 1829 with regard to these pillars? It is a lease made by the testator of the mines in question, "together with full and free liberty, power and authority to and for the said *Thomas Eyton* and *John Price Eyton*, their executors, administrators and assigns, and his and their agents, colliers, workmen and servants from time to time and at all times during the continuance of this demise, at their costs and charges to enter into and upon the lands, grounds and premises hereby demised or described, or any part or parts thereof *except and with such consent as hereinafter is mentioned*," (I dwell upon those words because it is plain that what is here called an exception relates to something which requires consent,) "and there to dig, bore, delve, sink, search for and raise, get and work the said pits, mines, seams and veins, and follow and pursue the same according to the law and custom of mines, but subject to the provisoes, limitations, agreements and conditions hereinafter contained." Then after other powers there comes a power "to do and perform all other reasonable acts and things necessary or proper for the carrying away the coal, cannel, slack and ironstone, and also full and free liberty of ingress, egress and regress into, out of and from the lands, grounds and premises except and subject nevertheless as hereinbefore and hereinafter is mentioned." There again it is to be observed that the exception is coupled with words of subjection. Then come

C. A.
1883
MOSTYN
v.
LANCASTER.
TAYLOR
v.
MOSTYN.
Fry, L.J.

certain strict exceptions, viz., the exception of coal under the mansion-house, the exception of the coal under the quay and the dock, and the exception of the timber. Then comes the usual *habendum*. Then amongst the covenants which are contained in the lease on the part of the lessees, is a covenant that they "shall and will at the end or other sooner determination of this demise, leave sufficient walls or pillars for the support of the roof, and for preventing of thrusts and creeps, and not remove the same without the consent in writing of the said Sir *Thomas Mostyn*, his heirs or assigns, for that purpose first had and obtained." Then in the lease of the 8th of December, 1843, Lord *Mostyn*, exercising the power conferred upon him by Sir *Thomas Mostyn*, demises to Mr. *Craig* all the collieries comprised in the deed of 1829, "and also all such and the like liberties, powers, authorities and privileges as by the said indenture of lease are granted or reserved to the said *Thomas Eyton* and *John Price Eyton*, their executors, administrators and assigns, and all other liberties, powers and authorities, and privileges whatsoever which are or shall be necessary and proper for searching for, raising, getting or working the said collieries, pits, mines, minerals, coal, cannel, slack and ironstone with effect, except as in the said indenture of lease is excepted." Now it has been contended that this exception is confined to the three strict exceptions to which I have referred, viz.: the exception of the coal under the mansion-house, the exception of the coal under the quay of the dock, and the exception of the timber. But as I have already pointed out there are other exceptions in that instrument which are not strict exceptions. There is a reference by way of exception to the inability to work the pillars, and the exception in the second indenture is in the words "except as in the said indenture is excepted." I think, therefore, that everything which is treated as an exception in that lease of 1829 is introduced as an exception in the lease of 1843: that in the lease of 1829 the restriction on the working of the pillars is treated as an exception, and that consequently it must be treated as an exception in the lease of 1843. The result is that the limitations of the power of working imposed by the lease of 1829 are still subsisting for the entirety of the term of ninety-nine years, subject only to this one

observation. As I have already pointed out, Lord *Mostyn's* life interest has become vested in *Robert Lancaster* by the instrument of the 17th of December, 1880, under a title derived from the deed of April, 1850; and supposing Lord *Mostyn* should survive the period fixed for the determination of the lease of 1850, namely, the year 1890, it would appear to me that *Robert Lancaster* can during the remainder of Lord *Mostyn's* life consent to the working of the pillars by persons who are interested under the lease of 1843. I propose, therefore, that the Court should declare that no injunction should be granted during such part of the term of ninety-nine years, created by the lease of 1843 as will subsist between the 10th of May, 1890, and the death of Lord *Mostyn*, in case Lord *Mostyn* should live after that date. The point is one no doubt of the smallest practical importance, and I only refer to it in order to make clear the principle on which the Court proceeds. As that has made no substantial difference in the matter, it will make no difference in the costs of the appeal which has been brought with regard to the injunction granted by the Vice-Chancellor. With that variation I am of opinion that both the judgments of the Vice-Chancellor ought to be affirmed, and the appeals dismissed.

BAGGALLAY, L.J.:—

I adopt all that has been said by Lord Justice *Fry*, and I have nothing to add.

LINDLEY, L.J.:—

I also entirely concur.

MINUTES OF ORDER:—Order that the judgment of the 16th of May, 1882, so far as relates to the injunction thereby granted, be varied, and as varied be as follows:—

That the Defendants, *Joshua Lancaster* and *T. Storey*, their servants, &c., be restrained during the subsistence of the term of forty years created by the indenture of the 10th of May, 1850, and during so much of the term of ninety-nine years created by the indenture of the 8th of December, 1843, as shall be unexpired at the death of Lord *Mostyn*, from working, removing, or injuring any of the pillars and walls of coal heretofore left for the support of the roofs of the mines in the collieries known as the *Mostyn Collieries*, and from working

C. A. 1883 MOSTYN v. LANCASTER. TAYLOR v. MOSTYN.

any mines in the said collieries without leaving substantial, good, and sufficient walls and pillars for the support of the roof, and for the prevention of thrusts and creeps.

With the above variations affirm the judgment.

Order Defendants in *Mostyn* v. *Lancaster* to pay the Plaintiffs' costs of the appeal in that action.

Solicitors: *Law, Hussey, & Hulbert; Gregory, Rowcliffes, & Co.*

H. C. J.

C. A. 1883 C. J. B. *Feb.* 12. C. A. *April* 19, 26; *May* 11.

Ex parte HAUXWELL. *In re* HEMINGWAY.

Bill of Sale—Registration—Act of Bankruptcy—Assignment of whole Property to secure Existing Debt—Prior Agreement—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 6, *sub-s.* 2—*Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 9.

A parol agreement to give a bill of sale does not require registration under the *Bills of Sale Act*, 1878, and a bill of sale given in pursuance of such an agreement is not void under the Act by reason of the non-registration of the agreement.

Decision of *Bacon*, C.J., reversed on additional evidence.

Graham v. *Chapman* (1), so far as it decides that a bill of sale which, to secure an existing debt and a present advance, assigns the whole of the grantor's property, including that which he may purchase by means of the advance, is necessarily void as an act of bankruptcy, must be taken to have been overruled.

ON the 13th of May, 1882, *Joseph Hemingway*, a flock manufacturer at *Wakefield*, opened a current account with the *Leeds and County Bank* at *Wakefield*, and obtained from the bank an overdraft, not to exceed £300, on the security of a joint and several guarantee given on the same day to the bank by *William Hauxwell* and *William Rogers*. *Hauxwell* and *Rogers* consented to give this guarantee upon a verbal agreement by *Hemingway* that he would give them, as security for or indemnity against their liability on the guarantee, an assignment of the whole of his furniture, stock-in-trade, machinery, and other chattels. There was a dispute whether such an agreement was in fact entered into before the guarantee was given, but on the evidence the Court of Appeal held that the existence of the prior agreement was established.

(1) 12 C. B. 85.

A bill of sale in accordance with the agreement was shortly afterwards prepared by Mr. *B. W. Kemp*, a solicitor, who was instructed by *Hauxwell* and *Rogers*, but considerable delay attributable to the debtor took place in its execution, and it was not executed by *Hemingway* until the 22nd of August, 1882.

The bill of sale was dated the 22nd of August, 1882, and it contained recitals to the effect that *Hemingway* had, on the 13th of May, 1882, applied to the manager of the bank for a loan not exceeding £300 on a current account, which the manager had agreed to advance on having the repayment thereof, with interest, secured to the bank by two sureties; that *Hemingway* had applied to *Hauxwell* and *Rogers* to become such sureties, which they had agreed to do on his giving to them "an assignment of the whole of his household furniture, goods, stock-in-trade, chattels, machinery, and effects hereinafter mentioned, which he had agreed to do whenever called upon to do so by" them; that the manager had consented to accept *Hauxwell* and *Rogers* as sureties; that they had thereupon entered into a written guarantee to the bank for the repayment of any sum not exceeding £300 and interest; and that *Hauxwell* and *Rogers* had requested *Hemingway* to execute such assignment as was thereinafter contained. And it was witnessed that, in pursuance of the agreement, and in consideration of the premises, *Hemingway* thereby granted and assigned to *Hauxwell* and *Rogers* "all the household furniture and household effects, and all other the goods and chattels, machinery, stock-in-trade, debts, bills of exchange, promissory notes, securities, documents, vouchers, books of account, and other personal property" of or to which *Hemingway* was beneficially possessed or entitled for any vested, contingent, or possible estate or interest. And for the more effectually securing to the bank repayment of the loan of £300 and interest, and indemnifying *Hauxwell* and *Rogers* as such sureties, *Hemingway* thereby irrevocably appointed them his attorneys at any time or times thereafter to execute any assignment or delivery "of any goods, chattels, bills of exchange, promissory notes, or other personal estate or property not legally passing by effect of the assignment hereinbefore contained," and which *Hemingway* should "before the satisfaction of this security become beneficially possessed or entitled to, or enabled to appoint,

C. A. 1883 *Ex parte* HAUXWELL. *In re* HEMINGWAY.

bind, or effect," either to *Hauxwell* and *Rogers*, or to a trustee or trustees for them, or to a purchaser or purchasers, or otherwise, subject to a proviso making void the deed on payment by *Hemingway* to the bank of the £300 and interest on demand in writing. And it was provided that if *Hemingway* did not immediately on demand in writing by the bank, or by *Hauxwell* and *Rogers*, pay all the principal and interest for the time being owing to the bank, then or at any time thereafter it should be lawful for *Hauxwell* and *Rogers* "to take possession of and get in all the estate, moneys, and premises comprised in these presents, or in any assignment to be made of the future property and effects of the said *Joseph Hemingway*, in pursuance of the power and authority hereinbefore contained for that purpose or any part thereof," and to sell the same, and out of the proceeds of sale to pay to themselves all principal moneys and interest which they might be called upon to pay to the bank as such sureties, and all costs occasioned by or incidental to the non-payment to the bank and the recovery thereof, and subject thereto to hold the proceeds of sale in trust for *Hemingway*. The principal money secured by the deed was limited to £300. The bill of sale was registered on the 28th of August, 1882. On the 6th of November, 1882, *Hemingway* filed a liquidation petition in the *Wakefield* County Court, and on the same day a receiver was appointed, and he took possession of the debtor's machinery and stock-in-trade in the mill which he occupied. *Hauxwell* and *Rogers* had taken possession under the bill of sale on the 30th of October. The bank had put the guarantee in force against them.

The trustees in the liquidation applied to the County Court for an order declaring the bill of sale void as against them.

The Registrar made an order declaring the bill of sale fraudulent and void as against the trustees, and an act of bankruptcy, and also void under the *Bills of Sale Act*, 1878.

Hauxwell and *Rogers* appealed to the Chief Judge. The appeal was heard on the 12th of February, 1883.

Cooper Willis, Q.C., and *Yate Lee*, for the Appellants :—

No question of order and disposition can arise here.

The bill of sale was a *bonâ fide* security for an actual advance,

made in pursuance of an agreement entered into at the time when the advance was made; and it has been duly registered. Hence it is a valid equitable security, and not an act of bankruptcy: *Ex parte Kilner* (1); *Ex parte Izard* (2). For the delay in the debtor's signature the Appellants are not to blame. They did what they could to get him to sign; but he purposely kept out of the way, and put them off from time to time.

Under this assignment the trustees have no title to the debtor's books of account: *Ex parte Good* (3); but we do not insist that the trustees should not have the custody of them.

Winslow, Q.C., and *R. Vaughan Williams*, for the trustees:—

Apart from the question, as to which there is conflicting testimony, whether the debtor really did agree, in May, to assign his property, this agreement ought to have been registered, under sect. 8 of the *Bills of Sale Act*, 1878. The Act says (sect. 4), "The expression 'bill of sale' shall include any agreement, whether intended or not, to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred." This was, in fact, the only agreement that was made. The solicitor, who might have furnished the correct facts and dates, has not been called. *Ex parte Kilner* (4), throws the onus of proving this agreement on the Appellants. What the Appellants have shewn is, that the bill of sale was a very different thing from the agreement. The agreement was to assign at most only what the debtor had on the 13th of May; the bill of sale not only conveys his property on the 22nd of August, which may have been very different from his property on the 13th of May, but it binds all his future property. That in itself would make the assignment an act of bankruptcy: *Graham* v. *Chapman* (5).

There is, moreover, a very important question of order and disposition here. Sect. 15 of the Act of 1882 no doubt saves everything done or suffered before the commencement of the Act (the 1st of November, 1882); but this petition and the acts of possession are all subsequent to the 1st of November, 1882. From the 1st

(1) 13 Ch. D. 245.
(2) Law Rep. 9 Ch. 271.
(3) 21 Ch. D. 868.
(4) 13 Ch. D. 245.
(5) 12 C. B. 85.

C. A. 1883

Ex parte HAUXWELL. *In re* HEMINGWAY.

to the 6th of November, 1882, therefore these goods were in the order and disposition of the debtor.

Cooper Willis, in reply:—

In all these cases the Court will draw its own inferences from the evidence as to the *bona fides* of the transaction.

[BACON, C.J.:—Is there any evidence before the Court as to the course of business after the execution of this bill of sale?]

There is no evidence, but it is undisputed that the debtor carried on business at the mill until shortly before the filing of the petition.

If there be any conflict of evidence, the debtor's solitary statement cannot outweigh the circumstantial testimony of both the Appellants. But is there any conflict? It is not disputed that the guarantee was given on the promise of security. The debtor very carefully says, "I now state that no agreement was made on the 13th of May by me to give an assignment of the whole of my property." But he does not say he never agreed to give an assignment of the whole; and he does not deny the visit to the solicitor's office, when the draft was read over, explained, and assented to by him. It has been objected that the agreement was not registered; but where it is part of a parol agreement that the agreement shall be carried out by a deed, and the deed is afterwards executed and duly registered, the Act does not say, and it is unheard of in practice, that the parol agreement as well as the deed must be registered. The only question is whether the conditions of the *Bills of Sale Act* have been complied with, as in *Ramsden* v. *Lupton* (1), and cases of that class.

The delay from the 13th of May to the 22nd of August has been accounted for, and shewn to arise from no fault of the Appellants, but the conduct of the debtor himself. If fraud is to be imputed, it was the debtor who was trying to defraud the Appellants throughout.

Graham v. *Chapman* (2) has been held not to have decided that a clause to enter and sell after-acquired property of itself renders a deed an act of bankruptcy: *Hutton* v. *Cruttwell* (3).

(1) Law Rep. 9 Q. B. 17. (2) 12 C. B. 85.
(3) 1 E. & B. 15; 12 C. B. 107, n.

This bill of sale was registered under the Act of 1878, and everything "done or suffered under" it is expressly saved by the repealing clause (15) of the Act of 1882; so that by sect. 20 of the Act of 1878 these goods are "not to be deemed to be in the possession, order, or disposition" of the debtor.

BACON, C.J.:—

This no doubt is a question of great importance, as every case is which involves a question under the *Bills of Sale Act.* The object and intention of all the *Bills of Sale Acts,* including that of 1878, which I am now dealing with, is that the utmost publicity should be given to the transaction of borrowing and lending, and to the nature of the security which has been given for the loan. Publicity is the thing that is required. The Act of Parliament in the plainest terms enacts (sect. 4) that if a man shall enter into any agreement with a lender included in the definition of a "bill of sale," "whether intended or not to be followed up by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon shall be conferred," such agreement shall be registered. The case here is that the lenders, the present Appellants, were induced to become sureties for the debtor to the bank mentioned in the sum of £300, and in return for that he was to give them a security. One of them says he mentioned to the debtor that he required security. The other says that he required the security of a bill of sale, and that the debtor agreed to make that security; and accordingly what the Appellants rely upon is an agreement which they say might have been specifically performed if they had taken proper steps to enforce it. In Equity no doubt it could have been enforced. But the statute requires that the agreement is to be registered for the sake of the creditors, and as it was necessary in order that the agreement should have any validity at all, that it should be duly registered, that argument in my opinion has no application to the present case.

The present case rests upon a bill of sale which recites that the debtor on the 13th of May applied to the manager of the bank for a loan of £300, and that the manager agreed to advance it to him on having the repayment secured to the bank by two sureties

C. A. 1883 *Ex parte* HAUXWELL. *In re* HEMINGWAY. C. J. B.

to be approved of by the bank. Then having mentioned the 13th of May, which becomes a critical date, it goes on to recite that *Hemingway* applied to the Appellants to become such sureties, which they agreed to do upon *Hemingway* giving to them an assignment of the whole of his "household furniture, goods, stock-in-trade, chattels, effects, and machinery hereinafter mentioned," which he agreed whenever called upon to do. These terms were submitted to, and they signed the guarantee. Now, excepting the mention of the 13th of May as being the day on which the application was made to the bank, there is no other mention of dates. Consistently with this it may have been long after the 13th of May when he applied to these Appellants, who do not state the time at which the application was made to them. Upon that subject it is said there is a conflict of evidence. No doubt there is. The debtor says, "Never before they signed the guarantee did I agree to give them security." They say that he did in fact. There is a conflict, therefore, of evidence on that point which compels me to leave it undecided.

The case is, therefore, reduced to the operation of the statute, and in my opinion nothing would be more unsafe, or more repugnant to the provisions of the statute, than to hold that, under a secret agreement—a non-registered, and therefore a secret agreement—a man should be able to go into the world and borrow £300 to enable him to carry on his trade, to contract debts, to acquire property, and to do all the things that a trader can do, when there was hanging over him this undertaking that he would when required execute an assignment. An assignment of what? The assignment promised, as I take it, could only have been of all that the debtor then had; otherwise the consequence would have been that as soon as he had got the guarantee for £300 he might have drawn a cheque on the bank for that identical sum, and upon the Appellants insisting, "Now you shall make an assignment to us of all your estate and effects," they might have realized that security, and so would have got the £300 into their own pockets. It is not necessary to try it by any such test as this because supposing this agreement to have been in the terms which the Appellants themselves represent, namely, that "if we execute the guarantee for you, you shall assign to us all your

effects;" does that mean anything more than the effects that he was then possessed of? He is allowed to carry on business from the month of May, or thereabouts, down to the month of August, without any security having been executed. What is the consequence of that? That the guarantors become secured for £300 against all the other creditors, and that the debtor was at liberty to deal to any extent he might think fit. Mr. *Willis* has argued that, as the agreement is a good agreement, and not in itself an act of bankruptcy, therefore it forms the true and proper consideration for this bill of sale, and that the bill of sale is nevertheless a valid instrument. In my opinion it is directly opposed to the enactments of the *Bills of Sale Act*, and the alleged agreement, if it had been proved more distinctly than it has been (but as I have said I adopt it as it is stated) would nevertheless not be sufficient consideration for this bill of sale. Nor is the agreement stated as being the consideration; for all the consideration that is stated is "In consideration of the premises." In pursuance of the said agreement, and in consideration of the premises, he conveys what? Not all that he had on the 13th of May, but all that he had on the 22nd of August, and that he might thereafter have; and from the date of the execution of the bill of sale it is not disputed that he carried on his business, and contracted debts, and acquired property; and then in October, shortly before his failure, the Appellants put their bill of sale in execution, and take the whole of the property under it.

Under these circumstances, in my opinion, not only in consequence of the binding effect of the statute to which I have referred, but also on the plain law of the case, this instrument made in consideration of an agreement not registered, is not an instrument which the Appellants can properly rely upon. I think the judgment of the learned Judge which I have heard read proceeds upon the right ground. This would be an evasion and violation of the law, and the order he has made cannot therefore be disturbed.

Appeal dismissed with costs.

J. B. D.

From this decision *Hauxwell* and *Rogers* appealed. The appeal

C. A. 1883 *Ex parte* HAUXWELL. *In re* HEMINGWAY.

was heard on the 19th and 26th of April and the 11th of May, 1883. Mr. *Kemp*, the solicitor who prepared the bill of sale, and who had not previously given any evidence, was examined in Court.

Cooper Willis, Q.C., and *Yate Lee*, for the Appellants:—

The *Bills of Sale Act* does not require a parol agreement to give a bill of sale to be registered; indeed such an agreement could not be registered unless it was first reduced into writing. If we relied on the agreement as the root of our title it would have to be registered, but when we use it only for the purpose of proving that sufficient consideration was given for the bill of sale, it does not require registration. Sect. 9 (1) of the Act does not apply to such a case. *Ramsden* v. *Lupton* (2) shews that, under the Act of 1854, when there were two bills of sale, the second being in substitution for the first, it was sufficient if the second was registered before an execution against the grantor was levied on the goods. The principle of that decision applies here. Our title is founded on the bill of sale, which was duly registered.

The bill of sale is not fraudulent or void as against the trustees in the bankruptcy. Its execution was not an act of bankruptcy. There was a *bonâ fide* agreement to give the Appellants a bill of

(1) Sect. 4: "In this Act the following words and expressions shall have the meanings in this section assigned to them respectively, unless there be something in the subject or context repugnant to such construction; (that is to say,)

"The expression 'bill of sale' shall include" (*inter alia*), "any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels or to any charge or security thereon shall be conferred."

Sect. 9: "Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it shall, to the extent to which it is a security for the same debt or part thereof, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the Court having cognizance of the case that the subsequent bill of sale was *bonâ fide* given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading this Act."

(2) Law Rep. 9 Q. B. 17.

sale for their security entered into at the time when they consented to guarantee the advance made by the bank. There was no agreement to postpone the execution of the bill of sale in order to save the credit of the grantor, and the Appellants in no way acquiesced in the delay which afterwards took place. On the contrary, they did all they could to procure the execution of the bill of sale. The delay was due entirely to the bankrupt. The bill of sale cannot, therefore, be impeached: *Ex parte Fisher* (1); *Ex parte Izard* (2); *Ex parte Kilner* (3); *Ex parte Burton* (4).

Winslow, Q.C., and *R. Vaughan Williams*, for the trustees:—

Ramsden v. *Lupton* (5) is entirely disposed of by sect. 9 of the *Bills of Sale Act*, 1878. A bill of sale which is supported by means of a prior unregistered parol agreement comes within the mischief of the Act. The evidence does not prove such an agreement as is necessary to satisfy the rule laid down in *Ex parte Fisher*. There must be an absolute agreement to give a bill of sale in any event, and the execution must not be postponed to save the credit of the grantor. Moreover, the *onus* of proving the *bona fides* of the agreement is on the bill of sale holder: *Ex parte Kilner*. Again, the bill of sale assigned everything the grantor had, including what he might purchase by means of the fresh advance. Such a deed is necessarily void as an act of bankruptcy. *Graham* v. *Chapman* (6) is an authority for this, and it has never been overruled; on the contrary, it has been followed. The meaning of the term "fraudulent" is shewn by *In re Wood* (7). It is not a question of intention. Nothing available for execution by the sheriff was left to the grantor: *Ex parte Hawker* (8). Moreover, the bill of sale goes beyond the agreement. The agreement alleged is to assign all the then existing property of the debtor. The deed assigns all his property existing at the date of the deed and all his future property.

(1) Law Rep. 7 Ch. 636.
(2) Ibid. 9 Ch. 271.
(3) 13 Ch. D. 245.
(4) Ibid. 102.
(5) Law Rep. 9 Q. B. 17.
(6) 12 C. B. 85.
(7) Law Rep. 7 Ch. 302, 307.
(8) Ibid. 214.

C. A.
1883
Ex parte HAUXWELL. *In re* HEMINGWAY.

Cooper Willis, in reply :—

The evidence shews that there was, when the guarantee was signed, a *bonâ fide* agreement to give a bill of sale, and that is sufficient to support the deed. The execution of the deed was not purposely postponed, as in *Ex parte Fisher* (1). We did all we could to obtain the execution. We have discharged the *onus* which is imposed on us by *Ex parte Kilner* (2). If it is necessary that a parol agreement to give a bill of sale should be registered, every bill of sale would be void, for there is always some prior verbal agreement. How can the deed be invalid merely because the grantor had acquired fresh property since the date of the agreement? The advance was clearly intended to enable the grantor to carry on his business. *Graham* v. *Chapman* (3) is practically overruled. As to the *onus* of proof, all that Lord Justice *James* meant by what he said in *Ex parte Kilner* was that you must shew circumstances from which any Court or any jury would infer that the prior agreement was entered into *bonâ fide*.

LINDLEY, L.J.:—

This is an appeal from a decision of the Chief Judge, affirming a decision of the *Wakefield* County Court, by which a bill of sale given by the debtor to the Appellants was held invalid.

The facts are very short, and, except on one point, they are hardly in dispute. [His Lordship stated the facts as to the advance by the bank to *Hemingway*, and the giving of the guarantee by *Hauxwell* and *Rogers* on the 13th of May, 1882, and continued :—]

Now as to whether there was or was not a promise by the bankrupt at that time to give them a security, so as to indemnify them against the liability which they incurred to the bank, there is a conflict of testimony. I am, however, satisfied that the truth lies on the side of the sureties, and that there was a *bonâ fide* arrangement of that kind. That is a mere question of testimony, and even on the affidavits I should have come to that conclusion, but with Mr. *Kemp's vivâ voce* evidence the point appears to me to be established beyond all reasonable doubt.

(1) Law Rep. 7 Ch. 636. (2) 13 Ch. D. 245.
(3) 12 C. B. 85.

Then, under circumstances which are more or less obscure, but which have been explained to us by Mr. *Kemp* to-day more fully than in the affidavits, the security which was promised was not in point of fact given till the 22nd of August. Without going through the evidence in detail, the result of it is that I am satisfied that the affidavits of the sureties are trustworthy, that not only was there an honest and real *bonâ fide* promise and undertaking to give the bill of sale, but that there was a proceeding on their part to get it, that they tried to get it, that they did not abstain from getting it in order to bolster up the credit of the person for whom they had become sureties; but that, so far as they were concerned, they were honestly doing their best to get the security which they wanted, and which had been promised to them. That is a question of fact and of inference, and that is the inference which I draw. I do not say I should have come to that conclusion upon the affidavits alone, but Mr. *Kemp's* evidence has satisfied me that that is the real truth of the matter.

We now come to the legal consequences of the facts, and the first thing we have to consider is whether this bill of sale, given on the 22nd of August, is good for anything at all. First of all we must consider it with reference to the *Bills of Sale Act*, because, as I understand it, the Chief Judge has held the bill of sale invalid, if not upon the construction of sect. 9 of the Act, at all events upon reasoning founded on that section. The 9th section of the Act, as I understand it, was passed for the purpose of meeting a specific method of evading the registration of bills of sale. That was the object of it, and the language is confined to that particular object. [His Lordship read sect. 9 and continued:—] The whole of the section is directed to this: "where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale." In terms the section does not apply to such a case as the present at all. It only applies to the specific method of evading the Act which is there pointed at. It appears to me, not only that the present case does not come within the section, but that it would not be in conformity with legal principles to base upon it a method of reasoning which would touch a transaction of this kind, which does not come within either the letter or the spirit of

C. A. 1883 *Ex parte* HAUXWELL. *In re* HEMINGWAY. Lindley, L.J.

the enactment. So far as the *Bills of Sale Act* is concerned, quite apart from the effect of the taking possession on the 30th of October, which of course is not to be lost sight of, it appears to me that the bill of sale cannot be held invalid.

Then it is said that, quite apart from the *Bills of Sale Act*, this bill of sale was an act of bankruptcy, and that is a much more formidable question. The bill of sale did in substance assign to the sureties for their security the whole of the grantor's property. It enabled them to seize everything which he had. It is contended that that is an act of bankruptcy, first, by reason of the decision in *Graham* v. *Chapman* (1), which, it is said, shews that if a bill of sale is so worded as to enable the grantee to seize, not merely all the property of the grantor, but all his property including that which may be bought by him by means of the advance then made to him, it is necessarily an act of bankruptcy. Well, if *Graham* v. *Chapman* did decide that, it appears to me that it is distinctly wrong. It has been so considered ever since it was decided. I do not say that the decision was wrong, because I am not sure that it is not open to the explanation which was given of it by Mr. Justice *Willes* in *Lomax* v. *Buxton* (2). He says (3), "I think that in dealing with the case of *Graham* v. *Chapman* we must take it to have turned on the particular terms of the deed, and the mode in which the advance was there made, and that though there was an advance in point of form, it came into the hands of the debtor under such circumstances that he did not get the real enjoyment of the money so advanced." If that is so, that which purported to be an advance was not an advance at all, and then one can understand the decision in *Graham* v. *Chapman*. But, so far as *Graham* v. *Chapman* is supposed to be an authority to the effect that a bill of sale in the form there used is necessarily bad, it appears to me that *Graham* v. *Chapman* has been dissented from and overruled, and cannot be supported.

But then it is said that, quite apart from *Graham* v. *Chapman*, this bill of sale ought to be treated as an act of bankruptcy, upon the principle enunciated by this Court and acted upon in *Ex parte Kilner* (4), upon the ground that, although there may

(1) 12 C. B. 85.
(2) Law Rep. 6 C. P. 107.
(3) Law Rep. 6 C. P. 113.
(4) 13 Ch. D. 245.

have been a *bonâ fide* agreement to give the bill of sale, yet the sureties had, in fact, been postponing the execution and the registration of it, in order to protect the credit of their debtor. Now, *Ex parte Kilner* (1) appears to me, if I may say so, to be a most valuable decision and a most valuable guide, and it points out the extreme care which ought to be taken before we uphold transactions of this description; and if the result of the evidence in the present case was at all doubtful, instead of its being, as it is, clear to my mind that this was an honest transaction on the part of the sureties, if I thought that they had been conniving at the non-execution or the non-registration of the bill of sale, I should not have hesitated for a moment to apply the doctrine of *Ex parte Kilner*. But the conclusion at which I have arrived is the other way; I believe that this case is outside any danger of that kind, and that therefore *Ex parte Kilner* does not apply. The principles of it of course do apply, but the facts are different and the evidence is different.

Upon these grounds, therefore, it appears to me that this bill of sale cannot be impeached, either under the *Bills of Sale Act* or as an act of bankruptcy, and that the order appealed from must be discharged.

FRY, L.J.:—

I entirely agree in the judgment which has been pronounced by Lord Justice *Lindley*. I accept in its fullness the doctrine laid down in *Ex parte Kilner*. I agree entirely that, as Lord Justice *James* there said (2), "where a document is set up which upon the face of it is an act of bankruptcy, that is, an assignment of all a man's goods for a past consideration, if it is said that it is not an act of bankruptcy because it is warranted by a prior agreement, the *onus probandi* is always upon the person who sets up the prior agreement to prove, not only that the agreement did exist in fact, but that it was in all respects a *bonâ fide* agreement." I would add this, that although in the present case the document was not given exclusively for an antecedent debt, but partially for a present advance, I think such a case requires to be watched

(1) 13 Ch. D. 245. (2) 13 Ch. D. 252.

C. A. 1883 *Ex parte* HAUXWELL. *In re* HEMINGWAY. Fry, L.J.

with extreme anxiety and care, because it is evident that to allow bills of sale to be supported by reason of antecedent parol contracts is a matter which requires the most anxious consideration. But in the present case I am satisfied that the burden of proof which is thus cast upon those who claim under the bill of sale has been supported. I have asked myself, in the first place, was there a real *bonâ fide* agreement for the immediate execution of the bill of sale, or was there any agreement to postpone its execution? The evidence has convinced me that there was an agreement for the immediate execution of a bill of sale, and that there was no original agreement to postpone its execution. I have then asked myself this second question: was there any acquiescence on the part of the sureties in the delay in the execution of the bill of sale, or did they take all reasonable steps to obtain the execution, and was the delay therefore due entirely to the debtor and not to them? It is not necessary to say whether the acquiescence must amount to an indication of an intention to allow the debtor to defraud his creditors. I have put the question in a manner more adverse to those who claim under the bill of sale. Here, again, the evidence satisfies me that there was no such acquiescence on the part of the sureties, but that the delay was really due to the unwillingness of the debtor to execute the bill of sale which he had, as I think, clearly promised that he would execute. [His Lordship referred to the details of the evidence, and continued:—] I have come, like Lord Justice *Lindley*, to the conclusion that the original contract for the execution of this bill of sale was one which was perfectly *bonâ fide*, that there was no acquiescence by the Appellants in the delay in its execution, and that consequently the burden of proof, which I am bound to say, in my judgment, rests very strongly on those who claim under such an agreement, has in this case, been discharged.

I desire to make this further observation, that we have before us evidence which was not before either the Judge of the County Court or the Chief Judge, and the only thing which has created any doubt in my mind, is the fact that one of my learned brethren is not so well satisfied with the evidence as I am.

BAGGALLAY, L.J.:—

I in no way dissent from the principles to which my learned colleagues have referred as applicable to cases of this kind, but I entertain doubts whether they have arrived at the right conclusion as regards the application of those principles to the circumstances of the present case.

I may say at the outset that I in no way dissent from what Lord Justice *Lindley* has said (on the contrary, I entirely agree with him), as regards the particular ground on which it would appear that the Chief Judge decided this case, namely, on the construction of the *Bills of Sale Act*, 1878.

The general principles applicable to cases of this kind, on the only point on which I propose to say anything, were most concisely stated by Lord Justice *Mellish* in *Ex parte Fisher* (1). They are stated so shortly that I will repeat what he said (2): "Although we do not dispute the rule that where a sum of money is advanced on the faith of a promise that a bill of sale shall be given, such sum is to be treated as a present advance on the security of a bill of sale, we do not think this rule will protect transactions where the giving of the bill of sale is purposely postponed until the trader is in a state of insolvency, in order to prevent the destruction of his credit which would result from registering a bill of sale. We think that such a postponement is evidence of an intention to commit an actual fraud against the general creditors."

The principles thus enunciated came under the consideration of the Court of Appeal in several cases in which the circumstances varied. In *Ex parte Izard* (3) and in *Ex parte King* (4), the Court was of opinion that the circumstances which were brought before it were not such as to invalidate the bills of sale which had been given, whereas in *Ex parte Burton* (5), which preceded by a very little *Ex parte Kilner* (6), the Court was of opinion that the circumstances were such as to invalidate the bill of sale.

I will not repeat my own views as to the general application of

(1) Law Rep. 7 Ch. 636.
(2) Ibid. 644.
(3) Ibid. 9 Ch. 271.
(4) 2 Ch. D. 256.
(5) 13 Ch. D. 102.
(6) Ibid. 245.

C. A.
1883
Ex parte HAUXWELL.
In re HEMINGWAY.
Baggallay, L.J.

these principles; I stated them in considerable detail in my judgment in *Ex parte Kilner* (1). But there is a passage in the judgment of Lord Justice *Thesiger* in that case, which is of importance as regards the general applicability of the further principle to which I shall presently allude. He said (2): "I think that the decision in *Ex parte Fisher* (3) supplied a most wholesome corrective to the dangers which, as it seems to me, may arise from the principles laid down in *Mercer* v. *Peterson*" (4) (which went a long way in the direction of holding that a previous agreement was sufficient to support a subsequent bill of sale) "and that we ought to apply the doctrines laid down by Lord Justice *Mellish* to their full extent, and to require, in this and similar cases, a very clear explanation of the reason why the giving of the bill of sale was delayed." Lord Justice *James*, at the close of Lord Justice *Thesiger's* judgment, added (5), "Where a document is set up which upon the face of it is an act of bankruptcy, that is, an assignment of all a man's goods for a past consideration, if it is said that it is not an act of bankruptcy because it is warranted by a prior agreement, the *onus probandi* is always upon the person who sets up the prior agreement to prove, not only that the agreement did exist in fact, but that it was in all respects a *bonâ fide* agreement."

I think that this qualification of the general principle, enunciated by Lord Justice *Mellish* in *Ex parte Fisher*, is a most valuable one. We unfortunately have constantly instances of bills of sale which we cannot help supporting, but as to which we cannot help having very grave suspicions, and I think it is of the greatest importance to uphold that principle to its fullest extent.

The question is, how are these principles to be applied to the case which we have now under consideration? Had the evidence remained as it was before the Chief Judge, I certainly should not have had the slightest doubt about upholding the decision at which he arrived. No doubt the additional evidence given here

(1) 13 Ch. D. 245.
(2) Ibid. 251.
(3) Law Rep. 7 Ch. 636.
(4) Ibid. 2 Ex. 304; 3 Ex. 104.
(5) 13 Ch. D. 252.

to-day by Mr. *Kemp* is very much to the advantage of the bill of sale holders. But, having given my best attention to the statement which Mr. *Kemp* has made, I am bound to say that he has not satisfied my mind that the execution of the bill of sale was not postponed for the purpose of protecting the credit of *Hemingway;* there appears to have been an acquiescence on both sides in this, that the bill of sale which was intended to be executed in May should remain as a dead letter for the time. I have heard no explanation of the delay beyond this, that both parties apparently allowed the matter to drop.

It has been suggested that, if the agreement was originally *bonâ fide* entered into, the not acting upon it for three months would invalidate the transaction. Possibly, if an agreement was entered into not to enforce it for a certain length of time, that might be prejudicial to any application to enforce it. But I regard the subsequent conduct, not so much as invalidating the agreement which had been previously entered into, but as throwing a light on the circumstances under which it had been entered into. The delay of three months from the time when the bill of sale was prepared to the time when it was executed, throws a certain amount of suspicion upon the transaction. It raises a suspicion that it was not executed, because, if executed, it would have to be registered, and, if registered, it would probably be disagreeable to the gentleman by whom it was executed. I do not entertain that opinion very strongly, because I feel that a good deal of what Mr. *Kemp* has said to-day has supported the case of the Appellants, but I entertain such an amount of doubt as regards the circumstances of the case, that I cannot say that I concur in the judgments which my learned brethren have pronounced.

As regards the costs, we think there should be no costs on either side. We do not say this on the ground that it is a suspicious case, because that would be contrary to the clear opinion expressed by both my learned brothers, nor do we put it on the ground of a difference of opinion amongst us. But we put it on this ground, that the Appellants have succeeded here, not upon the materials before the Chief Judge, but upon the

C. A. 1883 *Ex parte* HAUXWELL. *In re* HEMINGWAY.

additional evidence given here to-day. This applies to the whole of the costs.

Winslow asked for leave to appeal to the House of Lords.

THE COURT refused to give leave.

Solicitors for Appellants: *Singleton & Tattershall*, agents for *Barratt & Senior* and *B. W. Kemp, Wakefield.*

Solicitors for trustees: *Hickin & Graham*, agents for *Horner & Edmondson, Wakefield*, and *Blacklock, Leeds.*

W. L. C.

C. A. 1883 C. J. B. *Feb.* 26. C. A. *May* 24.

Ex parte HALL. *In re* WOOD.

Receiver in Bankruptcy—Injunction—Undertaking as to Damages—Enforcement—Delay.

An application to enforce an undertaking to be answerable in damages, given by a receiver in bankruptcy on the granting of an injunction to restrain proceedings in relation to property alleged to form part of the bankrupt's estate, ought to be made within a reasonable time after it is ascertained that the injunction has been improperly granted.

Unexplained and unreasonable delay in making such an application will be a sufficient ground for refusing it, even if the bankruptcy proceedings are still pending and the receiver has not obtained his discharge.

Held, that an unexplained delay of nearly four years in making such an application was a sufficient answer to it, though the applicant had shewn a *primâ facie* case.

ON the 20th of February, 1878, *Joseph Wood*, a farmer, who occupied a farm called *Lache Hall Farm*, near *Chester*, was adjudicated a bankrupt in the *Chester* County Court, upon a petition which had been presented on the 10th of January, 1878. On that day a receiver of the bankrupt's property was appointed by the Court. The bankrupt had on the 14th of August, 1876, executed a bill of sale of his growing crops, farming stock, household furniture, and other effects upon his farm, to *F. T. Hall*, to secure a sum of £1800. The bill of sale was registered on the 31st of August, 1876, and on the 27th of November, 1877, *Hall* took possession of the property, and in January, 1878, he advertised it for sale on

the 29th and 30th of January, 1878. On the 22nd of January, 1878, upon an *ex parte* application by the receiver, the County Court made an order restraining *Hall* from proceeding further with the sale of the goods until after the first meeting of the creditors under the petition, the receiver undertaking to abide by any order which the Court might thereafter think fit to make as to damages, in case the Court should be of opinion that *Hall* should have sustained any by reason of the order which the receiver ought to pay. This order was discharged by the Chief Judge on the 11th of February, 1878, upon a technical ground, but on the 15th of February another similar order restraining *Hall* from proceeding with a fresh sale which he had advertised, and extending to the 23rd of February, was made by the County Court upon a similar undertaking by the receiver, and on the 23rd of February this order was continued until the 14th of March, 1878, and it was afterwards again extended to the 25th of March. Before it had expired the landlord of the farm levied a distress for a half year's rent which accrued due on the 1st of March, 1878, and seized and sold a large part of the goods comprised in the bill of sale. The receiver had on the 22nd of February, 1878, prevented *Hall* by force from removing the goods from the farm, though the order did not restrain him from removing them, but only from selling them. The trustee who was on the 25th of March, 1878, appointed in the bankruptcy afterwards applied to the County Court for an order declaring the bill of sale void as against him, and on the 30th of May, 1878, an order was made to that effect. This decision was reversed by the Chief Judge, and his order was affirmed by the Court of Appeal on the 28th of November, 1878 (*vide Ex parte M'Hattie* (1)). On the 23rd of July, 1882, the receiver not having obtained his discharge in the bankruptcy, *Hall* applied to the County Court for an order that the receiver should pay to him such damages as the Court should be of opinion that *Hall* had sustained by reason of the restraining orders, and that if necessary it might be referred to the Registrar of the County Court to ascertain the amount of such damages. *Hall* claimed as damages the costs and expenses of the abortive sale, and the loss which had resulted to him from the distress

(1) 10 Ch. D. 398.

C. A. 1883 *Ex parte* HALL. *In re* WOOD.

levied by the landlord. On the hearing of this application no reference was made to the Registrar, but on the 13th of January, 1883, the Judge made an order finding and determining that *Hall* had not sustained any damage by reason of the restraining orders or any of them which the receiver ought to pay. The order contained a statement that, by consent of the parties, their counsel and solicitors, the Court had proceeded to a reference of the matters contained and referred to in the motion. One of the grounds of the decision was the delay which had taken place in making the application. *Hall* appealed to the Chief Judge. The appeal was heard on the 26th of February, 1883.

Cooper Willis, Q.C., and *W. H. Clay*, for the Appellant:—

The order is wrong in declaring that *Hall* has sustained no damage. He undoubtedly incurred the expense of advertising the property for sale for the 29th and 30th of January, 1878.

He also sustained damages by reason of the injunction of the 22nd of January, 1878, having been wrongly granted, and these damages are clearly within the undertaking: *Graham* v. *Campbell* (1). The "deterioration of the property by reason of the interference of the receiver," as expressed in the judgment of Lord Justice *James* in *Ex parte Warren* (2), in this instance amounts to this—that the whole property, except a few pounds in the hands of the auctioneer, has been swept away.

The practice in Chancery generally to apply for damages at the hearing of an action is founded on this, that the action is supposed to be at an end as far as proceedings in Court are concerned; but here the bankruptcy is still going on. The receiver was not a party to the proceedings which resulted in establishing the validity of the bill of sale.

Winslow, Q.C., and *F. Marshall*, for the receiver, were not called upon.

BACON, C.J.:—

In this case I do not think it necessary to call upon the Respondent. This subject of undertakings to be answerable in

(1) 7 Ch. D. 490, 494. (2) Law Rep. 10 Ch. 222, 227.

damages whenever injunctions are granted is, no doubt, an important one. The Court has reserved to itself in exacting an undertaking the power of dealing with the question of damages. It is not an undertaking to pay such damages as the party proceeded against may think he has sustained, but it is to pay such damages as the Court may think fit to award in respect of the injunction, or in respect of the subject-matter of the suit for injunction. Considering only the lapse of time that has occurred in this case, I should be strongly inclined to say that this application comes much too late. In 1878 all litigation between the parties had ended. There had been various proceedings which have been recapitulated at length. Upon each one of those proceedings when the parties were before the Court, an application might have been made by the present Appellant to have, in addition to the reversal of the order of which he complained, an inquiry as to the damage he had sustained. That was his clear right up to March, 1878, and he never thought, or if he thought, he never expressed the thought, that he had any claim in respect of damages. If the case, therefore, stood only on the lapse of time, I should be strongly inclined to say that this Court ought not to entertain the present application. But it is not necessary that I should rest my judgment upon any such ground as that, because I find that the parties themselves have dealt with that subject in a manner which to my mind is conclusive. The question of costs in the first instance is submitted to the discretion of the Court, and unless it is a very outrageous case this Court will not interfere with the discretion of the Court below in dealing with the question of costs in the course of the administration of the estate, when the latter Court is better informed of what the rights of the parties have been, and probably better able to take into consideration the conduct of the parties. However that may be, it is in the discretion of the Court to pronounce a decision upon the subject of damages. Mr. *Willis* has referred to two cases, in one of which the inquiry had been refused, and in which the Court of Appeal thought it wrong to refuse the inquiry. In the other case there was misconduct on the part of the Respondent who by following his own inclination had exposed someone else to loss, and there the Court thought there should be an inquiry

C. A. 1883 *Ex parte* HALL. *In re* WOOD. C. J. B.

as to damages. Neither of those cases has the slightest application to the case now before me; but besides the great lapse of time between 1878 and 1882, I find by the order which was made that the parties agreed and consented that the learned Judge who presided over the County Court should determine the question between them as to damages. The order is unequivocal, and after reciting what I need not read, because it has been so often read already, the order goes on to say, "Upon hearing the counsel in support of the motion, and the counsel for the Defendant, the trustee in opposition, and by consent of the parties, their counsel and solicitors, this Court having proceeded to a reference of the matters contained and referred to in the said motion, and having heard the said counsel and read the affidavits," and so on, "doth find and determine that" *Hall* had not sustained any damage by reason of the orders, or any of them, which the trustee had to pay. Such an order as that is not capable of being reviewed. The learned Judge has done that which according to law he was well entitled to do. I think he would not have been wrong if he had refused to entertain the application on the ground of lapse of time, but he did not, and accordingly that is not a subject to be considered for the purpose of the present decision. But he did, at the invitation and request and by the consent of all the parties, take upon himself the task of considering whether the undertaking to pay such damages as he in his discretion should think fit, ought to be enforced in favour of the present applicant. He has exercised that discretion, and I do not feel myself at liberty to interfere. I might as well be asked to open up some award which has been made by an arbitrator. It seems clear from the very long litigation which has taken place, that there have been various quarrels and disputes between the present applicant and the persons to whom the administration of the estate was entrusted, and that they entertained different views as to their respective rights. The receiver first and the trustee secondly endeavoured to protect the estate for the creditors. They failed in that attempt. The litigation came to an end on the hearing of the last appeal in 1878, and from that time till 1882 no one word or suggestion or demand on the part of the present applicant was made in respect of costs.

On the grounds I have stated—not omitting to consider the lapse of time—not deciding upon that alone, but considering that this was an order of reference made by consent, I find that the County Court Judge, being in the nature of an arbitrator, and besides that, having the authority which the statute and the terms of the undertaking vested in him, has come to a conclusion which I cannot disagree with, and have no right to interfere with. I therefore dismiss this appeal, which I think an unreasonable one, with costs.

C. A. 1883 *Ex parte* HALL. *In re* WOOD. C. J. B.

J. B. D.

From this decision *Hall* appealed. The appeal was heard on the 24th of May, 1883.

C. A.

Cooper Willis, Q.C., and *W. H. Clay*, for the Appellant:—

The damages which the Appellant claims are covered by the receiver's undertaking. The order of the County Court was an appealable order; the only consent given was that the Judge should himself determine the amount of the damages (if any) instead of directing an inquiry by the Registrar: *Bankruptcy Act*, 1869, s. 71; *Ex parte Streeter* (1); *Ex parte Warren* (2).

[THE COURT asked whether the receiver's counsel contended that the order of the County Court was unappealable.

Winslow, Q.C., for the receiver, admitted that he could not support the decision of the Chief Judge on that ground.

THE COURT said that they would hear the Appellant's counsel on the merits.]

The Appellant is clearly entitled to the costs of the abortive sale, and the loss caused by the landlord's distress is not too remote. The Court has jurisdiction in the matter until the close of the bankruptcy proceedings. The receiver has not yet been discharged. The delay in making the application has in no way injured the receiver.

[COTTON, L.J., referred to *Smith* v. *Day* (3)].

(1) 19 Ch. D. 216. (2) Law Rep. 10 Ch. 222.
(3) 21 Ch. D. 421.

C. A. 1883

Ex parte HALL. *In re* WOOD.

Winslow, Q.C., and *F. Marshall*, for the receiver, were not called on.

BAGGALLAY, L.J. (after stating the facts as to the granting of the injunctions, continued:—)

In November, 1878, the validity of the Appellant's bill of sale was established, and then arose his right to apply under the receiver's undertaking for an inquiry as to damages resulting from the injunction. No proceeding, however, to enforce the undertaking was commenced by the Appellant until July, 1882, nearly four years after his right accrued, when he applied to the County Court Judge for an order that the receiver should pay to him such damages as he was entitled to under the receiver's undertaking, and if necessary for an inquiry as to the amount of such damages. The County Court Judge dismissed the application on the ground that there were no damages for which the Court would hold the receiver answerable. The Chief Judge dismissed the appeal from this decision. The question of delay was raised before the County Court Judge. Perhaps the usual course was not strictly followed, inasmuch as a preliminary application for an inquiry as to damages was not made. Only one application was made to the County Court Judge, and I think this was a very reasonable arrangement between the parties. The Chief Judge commented on the delay in making the application, and intimated that he should probably have considered that delay of itself a sufficient answer to the application. But he disposed of the application on the ground that no damages had been sustained by the applicant, and that the parties had agreed that the County Court Judge should decide the matter once for all. Mr. *Winslow* has declined to rely on this latter ground, and we have to decide the case on its merits. On the question of damages I should be disposed to think that the Appellant has made out a *primâ facie* case which the Respondent would be bound to answer, but I am of opinion that the appeal must fail on the ground of delay. For nearly four years no application was made to enforce the undertaking, and this delay is in no way accounted for. No explanation whatever has been offered of it. I think it is of the greatest importance that any

C. A.
1883
Ex parte HALL.
In re WOOD.
Baggallay, L.J.

application of this kind should be made within a reasonable time after the happening of the facts which give rise to it. In *Smith* v. *Day* (1) the Judge of first instance had refused to enforce an undertaking as to damages, and the Court of Appeal upheld his decision on the ground that the damages complained of were not the natural consequence of the injunction which had been granted; but the Judges of the Court of Appeal, though they differed on another point, were almost at one on the question of delay. *Jessel*, M.R., said (2): "Then again the time at which the application is made is material. Having regard to the decisions, we are not entitled to say that the application for an inquiry must be made either when the injunction is dissolved or at the trial. One of these must be the most proper time. The application may be made when the injunction is dissolved, but if made then it probably will be ordered to stand over till the trial. If made by motion subsequently to the trial the party moving is subject to some disadvantage, for the application is one which should be made speedily, and not after the Court has forgotten the circumstances. After a lapse of time the statement of counsel is not enough; there must be evidence that damages have been incurred. In *Newby* v. *Harrison* (3) an inquiry was directed after four months, and I do not say that special circumstances might not induce the Court to allow more, but had it not been for that case I should have thought four months too long." Lord Justice *Brett*, expressed himself in similar terms. It is true that Lord Justice *Cotton* did not take so strong a view on this point as the Master of the Rolls, but he said (4): "As regards the time of the application, there is no doubt that the failure to apply earlier does not deprive the Court of its jurisdiction founded on the undertaking. It is certainly desirable that the application should be made either at the time when the injunction is dissolved or at the hearing of the cause. No rule, however, has been laid down that it must be made at one or other of those times, and I do not say that the Court ought to lay down any express limit as to time, still I think that a long delay might of itself be fatal to the application."

(1) 21 Ch. D. 421.
(2) Ibid. 425.
(3) 3 D. F. & J. 287.
(4) 21 Ch. D. 430.

C. A. 1883 *Ex parte* HALL. *In re* WOOD.

On the ground of delay, therefore, I think that the present appeal must fail.

COTTON, L.J.:—

We have not had the judgment of the County Court Judge before us, but the Chief Judge apparently decided the matter on the ground that no appeal lay from the order of the County Court. If that was really the ground of his decision, I cannot agree with him. The County Court Judge was exercising his ordinary jurisdiction under the *Bankruptcy Act*, and I think his decision was liable to appeal. I agree that the Appellant has established a *primâ facie* case for enforcing the undertaking, at least so far as regards the expenses of the abortive sale. I do not see how he could be entitled to damages for the loss sustained by the landlord's distress, because that was the result of an unjustifiable act on the part of the receiver. But the ground on which I think that the Court ought not to interfere is the delay of the applicant. I am of opinion that it is of the greatest importance when parties obtain an injunction upon giving an undertaking as to damages that, if the injunction has been wrongly granted, the Court should be asked promptly to enforce the undertaking. The undertaking is given to the Court, to be enforced by it if in its discretion it thinks right to do so. I do not think the Court ought to lay down any absolute rule as to the time within such an application ought to be made, but as a general rule I think the Court ought to be asked to enforce the undertaking within a reasonable time after it is ascertained that the injunction has been improperly granted. The party who desires to enforce the undertaking ought to be prompt in coming to the Court. In *Smith* v. *Day* (1) I said I thought a long delay might of itself be fatal to the application. Here the delay is for nearly four years; it is entirely unexplained, and it is so unreasonable that I think we ought not now to enforce the undertaking.

BOWEN, L.J.:—

I am of the same opinion. For nearly four years after the validity of the bill of sale was established the bill of sale holder

(1) 21 Ch. D. 430.

took no sort of step to enforce the receiver's undertaking. The undertaking is to abide by any order which the Court may think fit to make as to damages, in case it shall be of opinion that the bill of sale holder has sustained any by reason of the order which the receiver ought to pay. The County Court Judge decided that the bill of sale holder had sustained no damage which the receiver ought to pay. The application to him was an application to his discretion, though no doubt the discretion is to be exercised on legal lines. When a man applies to the discretion of the Judge to give him as damages the expenses to which he has been put by reason of an injunction, the greatest injury might be done if he did not come promptly. The Court has to consider all the facts of the case, and the application should be made before these facts have passed away from the recollection of the Judge. It is a reasonable presumption that a man who sleeps upon his rights has not got much right. It is said that the Appellant is entitled to the costs and expenses of the abortive sale, and but for the delay I should have thought that he had a *primâ facie* case. But the delay of more than three and a half years leads me to think that there must be some answer to his claim. Then it is said that the injunction prevented him from selling the goods until a period at which the landlord was able to seize them under a distress for rent. The injunction, however, only prevented the bill of sale holder from selling the goods, and did not prevent him from removing them from the premises; he was prevented from removing them by a wrongful act of the receiver, and the receiver's undertaking did not extend to make him answerable for any wrongful act outside the restraining orders. It is impossible to lay down a hard and fast rule as to delay, but it seems to me marvellous that the Appellant, if he had any real claim to damages, should not have brought it forward before. I can see no ground for disturbing the decision of the County Court Judge.

Solicitors for Appellant: *Denton, Hall, & Burgin.*

Solicitors for Receiver: *Chester, Mayhew, & Co.*, agents for *Walker, Smith, & Way, Chester.*

W. L. C.

C. A.
1883
FRY, J.
March 15.
C. A.
May 28, 29.

HUTTON *v.* WEST CORK RAILWAY COMPANY.

[1883 H. 918.]

Company—Management—Powers of General Meeting—Gratuities to Servants—Remuneration to Directors for past Services—Companies Clauses Act, 1845 (8 & 9 *Vict. c.* 16), *ss.* 67, 90, 91 [*Revised Ed. Statutes, vol. ix. pp.* 576, 580].

A company carrying on business has power, by the vote of a general meeting, to expend a portion of its funds in gratuities to servants or directors, provided such grants are made for the purpose of advancing the interests of the company. But this does not apply to a case where the company has transferred its undertaking to another company and is being wound up.

A railway company which had no provision in its articles for paying remuneration to directors, and had never paid any, sold its undertaking to another company at a price to be determined by an arbitrator. By the Act authorizing the transfer it was provided that on the completion of the transfer the company should be dissolved except for the purpose of regulating their internal affairs and winding up the same and of dividing the purchase-money. The purchase-money was to be applied in paying the costs of the arbitration and in paying off any revenue debts or charges of the company, and the residue was to be divided among the debenture holders and shareholders. After the completion of the transfer a general meeting of the company was held at which a resolution was passed to apply £1050 of the purchase-money in compensating the paid officials of the company for their loss of employment, although they had no legal claim for any compensation, and £1500 in remuneration to the directors for their past services :—

Held, by the Court of Appeal (*dissentiente Baggallay*, L.J.), that the resolution was invalid, as the company was no longer a going concern, and only existed for the purpose of winding-up.

Hampson v. *Price's Patent Candle Company* (1) and *Taunton* v. *Royal Insurance Company* (2) distinguished.

Per BAGGALLAY, L.J. :—The vote was within the powers of the company as it still retained the power of regulating its internal affairs.

Per FRY, J. :—Remuneration for past services of directors cannot be voted at an ordinary general meeting unless special notice be given of the intention to propose such a resolution.

BY the Act 42 & 43 Vict. c. clxxxvii. (*Cork and Kinsale Junction, Cork and Bandon, West Cork and Ilen Valley Railways Act*, 1879), the *Cork and Bandon Railway Company* was empowered to purchase the undertaking of the *West Cork Railway Company*

(1) 24 W. R. 754. (2) 2 H. & M. 135.

at a price to be fixed by arbitration. The sections referred to in the argument were as follows:—

Sect 5. For the purposes of this Act and of the *West Cork* transfer the undertaking of the *West Cork Company* shall consist of and be deemed to include their railway, stations, sidings, approaches, buildings, machinery, stores, plant . . . . and all the land and all other property, estate, moneys, and assets, with real or personal rights, powers, authorities, privileges, obligations, contracts, and liabilities, which on the 1st of January, 1880, belong or attach to or are vested in the *West Cork Company* (except cash in hand or with bankers, book debts, credits, and sums received or due on credit or revenue account, and except any profits then to be divided, and except the amount of the *West Cork* purchase-money hereinafter mentioned) . . . . Provided always, that the *Bandon Company* shall not, nor shall the undertaking of the *West Cork Company*, after the *West Cork* transfer, be or continue in any way subject or liable to any claims or demands whatsoever on the part of any of the mortgagees or other creditors of the *West Cork Company*, or of any other persons or person in respect of any bond, mortgage, debenture, stock, share, or other security or debt whatsoever of the *West Cork Company*, but the same shall be paid and discharged in each case by the *West Cork Company* prior to the dissolution of that company as hereinafter provided.

Sect. 12. The *West Cork Company* shall apply the amount of the *West Cork* purchase-money received by them from the *Bandon Company* to the following purposes in the following manner, that is to say:—

(*a.*) In paying their proportion of the costs of and incident to the arbitration and award, and subject thereto;

(*b.*) In paying off any revenue debts or charges of the *West Cork Company* so far as the same may not already have been paid out of revenue, and subject thereto;

(*c.*) In distributing the balance of such purchase-money to and among the respective classes of debenture stockholders (A, B, C, D, E, and F), preference and ordinary shareholders of the *West Cork Company* in such manner and proportion as shall be allotted, fixed, and determined

C. A.
1883
HUTTON
v.
WEST CORK
RAILWAY CO.

with respect to each such class by the arbitrator, but so that whilst the holders in each such class shall have distributed among them some part of the said balance of purchase-money, the arbitrator shall have regard to the priorities of the respective classes of holders.

Sect. 14. From and after the completion of the *West Cork* transfer, and the payment to them of the *West Cork* purchase-money, the *West Cork Company* shall be dissolved, excepting for the purpose of regulating their internal affairs, and winding up the same, and of applying the said purchase-money in accordance with the provisions of this Act.

At the time when this Act passed the *West Cork Company* was being worked under a scheme of arrangement sanctioned by the Court of Chancery on the 31st of May, 1873, whereby certain classes of debenture stock were created for the purpose of paying off the existing liabilities of the company, and it was provided that the holders of the debenture stock should vote at all general meetings of the company, and should have one vote for every £100.

The arbitrator appointed under the Act fixed the price for the purchase of the undertaking at £141,934, which was paid to the directors of the *West Cork Company;* and the directors then summoned a general meeting of the company, notice of which was given in the following terms:

"Notice is hereby given that a general meeting of the proprietors of the *West Cork Railway Company* will be held at the company's offices on Monday, the 26th of February, 1883, at two P.M., for the purpose of receiving the directors' report and statement of accounts and for the transaction of general business."

The report of the directors contained a paragraph which so far as material was as follows: "The directors propose with the view of enabling the proprietors to receive a final payment without delay, to take over the sum of £4000, out of which they will provide for certain law costs (which were specified in the report) and any further establishment expenses, retaining the balance for compensating the company's officials and their own remuneration."

The meeting had been duly advertised, the advertisement being

in the same form as the notice appended to the report, and a resolution had been passed by a large majority at the meeting adopting the report of the directors and authorizing the proposed application of the £4000.

The directors proposed to apply £1050, part of the reserved sum of £4000, in compensating the managing director and other paid officers of the company for the loss of their employment, and the remainder (after payment of the law costs and expenses), which they estimated at about £1500, in remuneration for the past services of the directors, who had never received any remuneration.

There was no clause in the company's articles of association authorizing any salary to the directors. The directors had never asked for any remuneration for their services before the transfer; and the paid officers had not complained of any wrongful dismissal.

The present action was brought by a holder of debenture stock of the *West Cork Company*, who dissented from the resolution, for the purpose of restraining the company from applying the £4000 in the manner proposed. The Plaintiff now moved for an injunction till the hearing. The motion was heard before Mr. Justice *Fry* on the 15th of March, 1883.

Cookson, Q.C., and *Seward Brice*, for the motion:—

An ordinary general meeting had no power to vote this remuneration to the directors retrospectively: *Dunston* v. *Imperial Gas Light and Coke Company* (1); *Companies Clauses Act* (8 & 9 Vict. c. 16), ss. 67, 91. At any rate, a more specific notice should have been given to the proprietors that it was intended to ask for a vote for retrospective remuneration of the directors.

Cozens-Hardy, Q.C., and *Beale*, for the Company:—

The object of the meeting was sufficiently indicated by the notices, and it was within the province of the general meeting to vote retrospective remuneration.

FRY, J., stated the facts, and said:—

It is said in the first place that there is not power in the

(1) 3 B. & Ad. 125.

C. A. 1883 HUTTON v. WEST CORK RAILWAY CO. Fry, J.

general meeting to award this sum to the directors at all. It appears that the 91st section of the *Companies Clauses Consolidation Act*, 1845, provides that one of the powers of the company which shall be exercised only at a general meeting of the company is that of determining the remuneration of the directors: I think therefore that it is plainly competent to a general meeting, if it be duly called, to vote the remuneration of the directors. But it is argued that under the circumstances of this case the general meeting had not that power, because the vote was retrospective and proposed to remunerate the directors not for future but for past services. It appears to me there is nothing whatever to prevent a general meeting from so voting remuneration for past services. To hold otherwise would preclude directors from foregoing their right to remuneration when a company might be in trouble and difficulty, and asserting their moral right to remuneration when the company had become prosperous by reason of their services. Of course if the majority of the shareholders present think it undesirable or improper to vote remuneration for past services, directors can have no claim whatever; but in case the majority think it reasonable and fit to vote a sum of money for past services, it appears to me a matter in which the majority can bind the minority.

Then it is suggested that the power is taken away by this circumstance; that the ultimate balance of the purchase-money is to be distributed amongst the debenture holders, and it is said they are not to be bound by the retrospective action of the general meeting of the company. But the Act subjects them to all the revenue charges and revenue debts, and if the company had the power of voting this remuneration to the directors, that is a revenue debt or a revenue charge. In passing I may observe that it does not appear to me that the payment is confined to those debts or charges of the current year only. I think that any arrears of such debts and charges would be payable before the ultimate sum which would become distributable among the debenture holders could be ascertained. But in the present case there is one circumstance to be observed upon, which makes it more than usually easy to arrive at that conclusion, namely, that by the scheme of arrangement under

which the debenture stock was issued, the debenture stockholders were themselves made capable of voting at general meetings, so that they had a voice in the voting of this charge; and if the Plaintiff had thought fit to attend and persuade his fellow-shareholders and fellow debenture holders, that sum might never have been voted. I think, therefore, that it was within the competence of the general meeting so to vote.

Then arises the second question, which is this: whether the general meeting has so voted as to bind the minority? Now it appears that on the 10th of February an advertisement and a notice of the general meeting were issued referring generally to the directors' report and their statement of accounts, but not stating that it was intended to ask for a vote for retrospective remuneration for the directors. [His Lordship read the notice.] Then the 67th section of the *Companies Clauses Consolidation Act*, 1845, provides, "No matters except such as are appointed by this or the special Act to be done at an ordinary meeting shall be transacted at any such meeting unless special notice of such matters have been given in the advertisement convening such meeting." The Act does provide for certain matters which are to be done at ordinary meetings; as for instance, the election of directors and the appointment of auditors, and I have no doubt that there are other matters specially provided to be done at ordinary meetings. But the Act does not provide that remuneration of directors shall be voted at an ordinary meeting. As I have already pointed out the 91st section provides that that is a matter to be done at a general meeting, leaving it undetermined whether the general meeting is to be an extraordinary or an ordinary one. I think it is not shewn that this is a matter that can be dealt with without special notice, and I think that the more because in the present case the vote is intended to have a retrospective effect—to remunerate the directors for past services, and this was a vote of more than ordinary importance, determining the final winding-up of the accounts of the company.

There is one other observation which I feel I ought to make, which is this—that the remuneration of the directors is of a particular description in this case, because it is proposed to give

C. A. 1883 HUTTON v. WEST CORK RAILWAY CO. Fry, J.

them a sum of £4000, out of which they are to pay the law costs, the compensation to the managing director, and the estimated expense of the winding-up of the company, and therefore the amount of remuneration is uncertain. It appears to me that there is nothing whatever to restrain the company making such a vote. They may make the amount contingent upon events which are brought to their attention, and in the present case it is eminently reasonable that such a vote shall be made; because it would enable the directors to declare a final dividend amongst the shareholders and debenture holders, and prevent a delay which would otherwise be inevitable in the receipt of the money coming to those persons. I think that would be within the competency of a meeting.

I must grant an injunction until the vote be submitted to a general meeting properly called.

C. W. C.

Notice of an extraordinary meeting was accordingly given for the 19th of April, 1883, "for the purpose of passing resolutions relating to the application of a sum of £4000 mentioned in the directors' report of February, 1883, as proposed to be retained by them to provide for payment of law costs and establishment expenses and the compensation of officials and remuneration of directors, thereby enabling them to divide the ultimate balance and for the determination of such remuneration accordingly."

At this meeting the resolution proposed by the directors was carried by a large majority.

C. A. The Plaintiff appealed from the decision of Mr. Justice *Fry*. The appeal was heard on the 29th of May, 1883.

Cookson, Q.C., and *Seward Brice*, for the Appellant:—

We are entitled to an injunction notwithstanding the resolution passed at the recent meeting of the company. A general meeting whether ordinary or extraordinary has no power to expend the money of the company in the manner proposed. With respect to the remuneration to the directors it might have been given them by a formal vote under the 91st section of the *Companies Clauses Act* while the company was a going concern; but this was

never done, and the directors volunteered to give their services gratuitously. It is too late now when the company has ceased to carry on business to grant remuneration for past services: *Dunston* v. *Imperial Gas Light and Coke Company* (1). By the 14th section of the Act of 1879 the company has ceased to exist except for the purpose of winding-up. The 12th section limits the objects for which the company can now apply the funds, and this is not one of them.

The same objection applies to the grant for compensation to the officers who have lost their employment by the transfer of the undertaking. They received the proper notice for the termination of their services and are entitled to no compensation at all. Neither this nor the remuneration to the directors is a revenue debt or charge within the meaning of the 12th section of the Act of 1879.

If the vote of £1050 for the officials is void it follows that the vote for the directors is void also; for it was the residue of the sum of £4000 after satisfying the costs and the vote for the officials, and it could not have been intended that if the vote for the officials failed the directors were to have the whole sum except the costs.

Cozens-Hardy, Q.C., and *Beale*, for the Company:—

If the company had been carrying on business in an ordinary way there would have been no question that these payments would have been within their power. A company has always power to remunerate its directors for past services and to make gratuities to its officers or servants; indeed where the remuneration is not provided for by the articles the grant to the directors for the past year must be retrospective: *Lambert* v. *Northern Railway of Buenos Ayres Company* (2); *Hampson* v. *Price's Patent Candle Company* (3); *Taunton* v. *Royal Insurance Company* (4). The only question would have been whether the vote was made *bonâ fide*. There has been nothing in the present case to deprive the company of this power. Under the express words of the 14th section

(1) 3 B. & Ad. 125.
(2) 18 W. R. 180.
(3) 24 W. R. 754; 45 L. J. (Ch.) 437.
(4) 2 H. & M. 135.

C. A. 1883 HUTTON v. WEST CORK RAILWAY CO.

of the Act of 1879 the company still exists for the purpose of "regulating its internal affairs." There is a great deal of business still to be done before the winding-up is completed, and the remuneration to the directors had reference to their services in the winding-up, which is still going on, as well as to their past services. The remuneration to the directors is a "revenue charge" within the meaning of the 12th section. The expression refers to the *Railways Regulation Act*, 1868. If the vote for the officials fails the vote for the directors may stand. The resolution is divisible: the officials were to have £1050 and the directors £1500 or thereabouts.

Seward Brice, in reply.

COTTON, L.J:—

This is an application by way of appeal from Lord Justice *Fry* for an injunction to restrain the Defendant company from dealing with a sum of £4000 in accordance with a certain resolution that was passed at a general meeting of the company on the 19th of April last. Lord Justice *Fry* had in the then state of things granted an injunction because no meeting had been called at which a resolution could be passed in accordance with what he thought were the powers of the company in general meeting assembled; but he intimated an opinion, adversely to the present Appellant, that if a meeting were duly called and a resolution duly passed that meeting would have power to deal with the £4000 in the way in which it has been proposed by the resolution to deal with it. The Plaintiff now applies by way of appeal for an extended injunction, the injunction of Lord Justice *Fry* being only until a resolution was passed by a general meeting authorizing the application of the money.

The case is this, the *West Cork Railway Company*, who are the Defendants, are a company who under an Act of Parliament have sold their undertaking to the *Bandon Railway Company* and received as the purchase-money a sum settled by arbitration at £141,934. One of the sections of the Act of Parliament, sect. 12, upon which the question mainly turns, was a section which provided how that sum of money was to be dealt with when

it was paid by the *Bandon Railway Company*, and the real question is—whether, having regard to that section, it was in the power of a general meeting to direct that the £4000 should be applied in the way proposed. It is not necessary, I think, to go in great detail into the sections of this Act of Parliament, some of them are not very intelligible. [His Lordship read the 5th section, and proceeded:—] It is clear that the proviso in this section contemplates that there will be some money debts which shall not be undertaken by the purchasing company—the *Bandon Company*—but shall be paid by the *West Cork Company* and shall be paid prior to its dissolution. In my opinion the probable meaning of the proviso is that all debts for a sum certain, including claims for damages established by judgment before the 1st of January, 1880, were to be paid by the *West Cork Company;* but other liabilities, including claims for damages not established by judgment before that day, were to be undertaken by the purchasers, the *Bandon Company*.

But then we come to the 12th and 14th sections. [His Lordship read the sections.] What has been proposed to be done is this: There was a sum of £4000 which was set apart, and it was proposed that out of that certain costs should be paid, and then out of the balance it was estimated that there would be enough to give £1050 as compensation to the managing director and other officials, and then that there should be a sum paid to the directors which was estimated to amount to about £1500. The question is whether that can or ought to be done under this resolution.

As I understand, the state of things has been this:—The officials for whom the £1050 is proposed to provide were paid as long as they continued in the service of the company, and there is no evidence at all that they made any claim for a discharge without due notice, or that they have any legal claim against the company for not being continued in receipt of their salaries. It must be dealt with upon that footing. Therefore, as regards them, this sum of £1050 must, in my opinion, be considered not as a payment made to them in respect of any legal claim which they have as against the *West Cork Company*, but simply as a gratuity to them for their not being continued in the receipt of that

C. A. 1883 HUTTON v. WEST CORK RAILWAY CO. Cotton, L.J.

remuneration which, had the company lasted, and had they continued in its service, they would have received.

Then, as regards the directors, the matter stands on a somewhat different footing. The present directors apparently have never received any remuneration at all for their services whilst the company was carrying on the undertaking, and before the *Bandon Company* took possession of the railway. The evidence, I think, is that neither the present nor any other directors of the company ever did receive anything, and there is no evidence that there was any resolution in any way fixing the remuneration to be paid to the directors.

Under those circumstances there are two matters to be considered. Of course there can be no objection at all to so much of the resolution as provides for payment of the costs and expenses which are to be provided for out of the £4000. But can the resolution be considered as *intra vires* as regards the two other matters? I will take first that which provides for compensation to the managing director and other officials. It was said that it is within the powers of the directors of a trading or business company to grant gratuities to its servants, and that this case comes within that principle, as the directors of this company retained such powers as were incident to a company of this kind, notwithstanding that its railway had been handed over to the purchasing company—the *Bandon Company*. I think that the directors did continue to have powers, so far as they were necessary for or incidental to the winding-up of the company. But, in my opinion, they had not such powers as only are impliedly given to general meetings or to directors because they are carrying on a business for the purpose of carrying on its business, and for the purpose of making a profit from it. Cases were referred to in which the late Master of the Rolls and Vice-Chancellor *Wood* had determined that matters which were not under the powers expressly given to the directors or the general meeting were within the powers of the directors of a going concern. One was *Taunton* v. *Royal Insurance Company* (1), where it was held that an insurance company might pay losses arising from lightning, which were not within the loss which they professed to insure

(1) 2 H. & M. 135.

against; and the other case, *Hampson* v. *Price's Patent Candle Company* (1), where the Master of the Rolls held that the directors of *Price's Patent Candle Company* were at liberty to make, and could not be restrained from making, a gratuity to their servants when there had been a very good year, by giving each of them who was in their service and was of good character a gratuity equal to a week's wages. In my opinion those cases went on a principle which is not applicable to the existing state of this company, from the time when it handed over its railway to another company, and existed only for the purpose of winding-up the concern. The principle of those cases, as I understand, is this, that where there are directors of a trading company, those directors necessarily have incidentally the power of doing that which is ordinarily and reasonably done in every such business, with a view to getting either better work from their servants, or with a view to attract customers to them, as in the case of an insurance company. In the last-mentioned case the Master of the Rolls refers to this—that although it is said that nothing of this kind is to be expected again, yet when such a gratuity is given to servants in a good year, the servants then in the company's service, whom the directors may reasonably expect to stay, naturally look forward, not as a matter of right but as a matter of liberality, to this, that they will probably be dealt with in a similar way if by their exertions they get a good profit, and that, therefore, that was a reasonable mode of carrying on the business of the company for the purpose of making it most profitable. But that assumes that it is a going concern, that it is a continuing business, and it is with reference to the effect upon the continuing business that the directors are said to have that power incidentally. And so in the case before Vice-Chancellor *Wood*. There it was shewn that what the insurance company did was a reasonable way of conducting the business of an insurance office, in order to attract customers, by paying losses which were not strictly within the terms of the policy, and therefore could not be said to be legally enforceable against the company. But here the company was gone as a company carrying on business for the purpose of making profit, and the sums paid, therefore, to its officials and managing directors, could not be

(1) 24 W. R. 754.

C. A. 1883 HUTTON v. WEST CORK RAILWAY CO. Cotton, L.J.

looked upon as an inducement to them to exert themselves in future, or as an act done reasonably for the purpose of getting the greatest profit from the business of the company, but must be looked upon simply as a gratuity, perhaps reasonable in itself, but without any prospect of its in any way reasonably conducing to the benefit of the company. In my opinion, therefore, under these circumstances, neither the directors nor the general meeting had any power in the circumstances which are before us, as I understand the facts of the case, of granting that compensation to the officials and other servants.

Then comes the question as to the directors. I was not quite satisfied that the vote for compensation to the officials would not alone prevent this resolution from being acted upon, because I have some little doubt whether the £1050 is a sum set apart for compensation, or whether the whole thing is a sort of estimate which was made. There was a good deal in what Mr. *Cookson* argued that if the £1050 was a sum which the persons invited to the meeting had to look upon as one which could lawfully be granted, they might have thought it not worth while to come and oppose the grant to the directors. I am not at all satisfied that the Court would sanction it if it had been voted in this way—take a sum of £4000, out of that pay certain expenses the amount of which can only be estimated, and then let the remainder be distributed amongst the directors by way of remuneration in a case where remuneration could be granted to them of an amount reasonably suitable for the services which they had rendered. It might be quite right to say that if the services were estimated at £1500 they should have any sum not exceeding £1500 out of the balance of the sum provided. But I do not think that if it ever comes to be considered such a resolution would be a resolution which would be approved. But I do not dispose of it at all in that way. What we have to do is to consider this Act of Parliament and the state of the company. I do not propose to lay down any general rule as to how far a general meeting could under the powers of sect. 91 of the *Companies Clauses Act* in a going concern and where they are not bound by any special clause in their articles as to the application of their funds, give remuneration to directors not only for the current year or for the first

year, but for past years during which they have acted apparently without intending to receive any remuneration at all. But here what we have is this—that for all the duration of this company the directors have never received any remuneration at all, and there has been no resolution saying that they shall have any. I quite agree with what Mr. *Hardy* said that during the first year of a parliamentary company which comes under the *Companies Clauses Act* directors must be acting without any fixed salary, but merely in expectation of receiving such a salary as the general meeting may grant them, and that therefore it must be in expectation. But then I think that would negative the idea that they had agreed to act without any remuneration. They were agreeing to act for such remuneration during that time at least as the general meeting at the end of the first year should grant them. But when directors have for many years gone on without it even being suggested that they should have any remuneration, and we have this Act of Parliament which contains this clause sect. 12 (*b*) —that the purchase-money, after providing for the costs of the Act, shall be applied in paying off any revenue debts or charges of the *West Cork Company* so far as the same shall not already have been paid out of revenue—although undoubtedly it enables the purchase-money to be applied in payment of any charges constituted by a resolution of a general meeting or otherwise as charges which under the *Railways Act*, 1868, would properly come as against revenue—yet in my opinion it was not competent to a general meeting to deal with this fund when it came to distribute it in providing for any remuneration to the directors for those services which they had been giving during the time the company was a going concern without any remuneration, and without any resolution of a general meeting or other stipulation which entitled them to remuneration.

I do not however mean to decide—in fact my opinion is rather the other way—that a general meeting of this company could not in the winding-up, and in exercising for the purpose of the winding-up the powers given by sect. 91 of the *Companies Clauses Act*, give to the directors what may be considered a fair remuneration for their services to the company after the railway and the undertaking had been taken over by the *Bandon Company*, and all that

C. A. 1883 HUTTON v. WEST CORK RAILWAY CO. Cotton, L.J.

was being done was being done for the purpose not of carrying on the railway as a going concern but for the purpose of doing that which was incidental to and connected with the winding-up of the company. If it had been shewn that this sum was given to the directors really as a payment to them of a proper sum for their services during the winding-up in the interval from the 1st of January, 1880, to the present time, my opinion would have been that that could not have been attacked. But I think on the evidence the necessary inference is that this sum of £1500 was agreed to or voted to be paid to them not as a reasonable sum for remuneration for their services during that term, but as a sum which might with reasonable generosity be paid to them taking into consideration the fact that they never received anything during the years when they carried on the railway. That, I think, was beyond the powers which the company preserved under sect. 14, and the powers of the *Companies Act* incidental to carrying on the winding-up of the company, and therefore would be *ultrà vires*.

In my opinion, therefore, though the two cases are different, yet neither as regards the compensation to the officials nor as regards the vote of £1500 put in that way for the directors, can this resolution be considered as one within the powers of a general meeting held under this Act. I have not gone into the question—I understand none is now raised—as to whether the meeting was properly called, I have dealt with the case upon the footing that the Plaintiff here stands in no better position than the shareholders would, that is to say, he is a person, who by the vote of a general meeting of the company, acting within its powers, would be bound, and could not object simply because he thought the resolution unreasonable, or that it was too large a sum to vote.

Therefore the injunction, which I think ought to be granted, will be confined to this, to restrain the company from applying any part of the £4000 in accordance with the resolution of the 19th of April otherwise than in payment of the costs and expenses which are resolved to be paid thereout. That, I think, would be the form of injunction which should be granted, and of course it is perfectly right to add that it is not to be considered as preventing the company in general meeting from voting any sum out of the purchase-money as a reasonable remuneration for

the services of the directors during the period subsequent to the 1st of January, 1880.

That is my opinion; but I think I ought to say what I think is the meaning of clause (*b*) of the 12th section. The general debts had to be provided for by the resolution, but the provision in sect. 5 clearly does consider that some other debts still remain to be paid by the *West Cork Company*. What I think is this, that it was intended that all the debts and charges which would be incurred in winding-up or which would be incurred since the time when it was dealt with by the scheme of 1873, should be practically revenue debts and charges. I think it cannot be considered that that is confined to revenue debts and charges incurred or become such at the time when the company was a revenue making company by means of its railway. In my opinion all those charges which would necessarily or properly be incurred in winding up the company would be charges which by the General Act of 1868 would come in the schedule of revenue debts and charges; and even if there was such a case as that which occurred to my mind, as a claim for an accident which had ripened into a judgment before the 1st of January, 1880—that is mentioned specially in the Act in the revenue account and not in the capital account. So that I think the clause means this, that all the charges incurred previously to the complete winding up and distribution of the money will be in the nature of revenue debts and charges; those are to be provided for and they shall be provided for out of this capital sum to prevent any difficulty being suggested that under the general Act they can only be paid out of income. I think that this section (*b*), intends to provide for all charges properly payable by the company before the distribution of the purchase-money.

In my opinion, therefore, the injunction should be granted in the way I have mentioned.

BOWEN, L.J.:—

I am of the same opinion. I need hardly say with what hesitation I differ from the view of Lord Justice *Baggallay* and Lord Justice *Fry*, and I unfeignedly say that I would rather trust their opinion than my own, but unfortunately the law does not

C. A. 1883 HUTTON v. WEST CORK RAILWAY CO. Bowen, L.J.

allow me to do so. I am bound to form an opinion for myself, and I am bound, therefore, in respect to their great authority to say why it is that I take the view which Lord Justice *Cotton* has taken.

Now the directors in this case have done, it seems to me, nothing at all wrong. Let us clear the ground, because my sympathies are rather with the judgment of Lord Justice *Fry*, if one could really exercise sympathy in a case where questions of law have to be decided. Not only have they done nothing wrong, but I confess I think the company have done what nine companies out of ten would do, and do without the least objection being made. They have paid, perhaps liberally, perhaps not at all too liberally, persons who have served them faithfully. But that, of course, does not get rid of the difficulty. As soon as a question is raised by a dissentient shareholder, or by a person standing in the position of a dissentient shareholder, sympathy must be cut adrift, and we have simply to consider what the law is. In this particular instance the Plaintiff is a person who stands *primâ facie* in the condition of those who are bound by the vote of a general meeting acting within the powers of a general meeting, but he complains that the majority propose to expend certain purchase-money which the company are receiving from the *Bandon Company* in two ways which he thinks are beyond their powers. In the first place he says that the majority are going to spend money in compensating the managing director and other officials, who are being extinguished by this transfer to the *Bandon Company*, for the loss of their places. Now the compensation which is to be awarded is not compensation for any legal loss they have sustained: because I understand that these gentlemen could always have been discharged, and have received notice amply sufficient to prevent them from having any cause of legal grievance, and they simply have been asked in the usual way to cease to serve the masters who have no further cause for their services. In the second place, the Plaintiff complains that money is sought to be paid for remuneration of the directors. The facts there, again, deserve to be shortly summarized. They are directors who for many years have served the company for nothing, and I cannot help thinking that down to the time this purchase-money was

to be received it was always understood that they were going to serve the company for nothing. I see no reason to think, at all events, that they ever meant to put forward any claim. But, after this arrangement of transfer to the *Bandon Company*, and after the company is wound up, or towards the close of its winding-up, it is proposed to pay them a lump sum, the measure taken not being the measure of service they have rendered in the winding-up, but a general view which the company entertains of their past merits. Now can a majority compel a dissentient unit in the company to give way and to submit to these payments? We must go back to the root of things. The money which is going to be spent is not the money of the majority. That is clear. It is the money of the company, and the majority want to spend it. What would be the natural limit of their power to do so? They can only spend money which is not theirs but the company's, if they are spending it for the purposes which are reasonably incidental to the carrying on of the business of the company. That is the general doctrine. *Bona fides* cannot be the sole test, otherwise you might have a lunatic conducting the affairs of the company, and paying away its money with both hands in a manner perfectly *bonâ fide* yet perfectly irrational. The test must be what is reasonably incidental to, and within the reasonable scope of carrying on, the business of the company. Applying that kind of view, what is the character of these payments? First of all, I ask myself what is the kind of touchstone or test to apply if the company was an ordinary going concern; and, secondly, whether this company is still in the same position as an ordinary railway, or whether it has not become a railway company of a very limited kind, a business adventure of a very exceptional sort, and its business contracted accordingly within very narrow and easily defined limits.

But, first of all, let us consider in what kind of way one would deal with the case of an ordinary railway, because this has been said and pressed upon us by Mr. *Hardy* in his most able and clear argument. Mr. *Hardy* has pressed upon us the fact that it is amply within the powers of an ordinary company to pay away money for the remuneration of its directors in the past. I do not say it is not so, within certain limits. But what is the remuneration

C. A.
1883
HUTTON
v.
WEST CORK
RAILWAY CO.
Bowen, L.J.

of directors? I think it is pretty clear that, like the compensation for loss of the services of the managing director, it is a gratuity. A director is not a servant. He is a person who is doing business for the company, but not upon ordinary terms. It is not implied from the mere fact that he is a director, that he is to have a right to be paid for it. In some companies, not in railway companies, perhaps, so often as in other companies, but in some companies, there is a special provision for the way in which the directors should be paid; in others there is not. If there is a special provision for the way in which they are to be paid, you must look to the special provision to see how to deal with it. But if there is no special provision their payment is in the nature of a gratuity, as was pointed out in the case cited by Mr. *Cookson* of *Dunston* v. *Imperial Gas Light and Coke Company* (1). Directors, under those circumstances, often do get money. But whenever they get it it is in the nature of a gratuity voted. That does not get rid of the difficulty, because one must still ask oneself what is the general law about gratuitous payments which are made by the directors or by a company so as to bind dissentients. It seems to me you cannot say the company has only got power to spend the money which it is bound to pay according to law, otherwise the wheels of business would stop, nor can you say that directors who have got all the powers of the company given to them by sect. 90 of the *Companies Clauses Consolidation Act*, are always to be limited to the strictest possible view of what the obligations of the company are. They are not to keep their pockets buttoned up and defy the world unless they are liable in a way which could be enforced at law or in equity. Most businesses require liberal dealings. The test there again is not whether it is *bonâ fide*, but whether, as well as being done *bonâ fide*, it is done within the ordinary scope of the company's business, and whether it is reasonably incidental to the carrying on of the company's business for the company's benefit. Take this sort of instance. A railway company, or the directors of the company, might send down all the porters at a railway station to have tea in the country at the expense of the company. Why should they not? It is for the directors to judge, provided it is a matter which is reasonably incidental to the carrying on of

(1) 3 B. & Ad. 125.

the business of the company, and a company which always treated its employés with Draconian severity, and never allowed them a single inch more than the strict letter of the bond, would soon find itself deserted—at all events, unless labour was very much more easy to obtain in the market than it often is. The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.

Now that I think is the principle to be found in the case of *Hampson* v. *Price's Patent Candle Company* (1). The Master of the Rolls there held that the company might lawfully expend a week's wages as gratuities for their servants; because that sort of liberal dealing with servants eases the friction between masters and servants, and is, in the end, a benefit to the company. It is not charity sitting at the board of directors, because as it seems to me charity has no business to sit at boards of directors *quâ* charity. There is, however, a kind of charitable dealing which is for the interest of those who practise it, and to that extent and in that garb (I admit not a very philanthropic garb) charity may sit at the board, but for no other purpose. In the same way may be put the past remuneration of directors. A company could not always go on if the moment the directors had served six weeks or months, or a year, they insisted on their immediate remuneration for the past period. That is not the way to do business. The past remuneration of directors seems to me like the gratuitous wages in *Hampson* v. *Price's Patent Candle Company*, to be justifiable, provided it is within the scope of the business of and secures advantage to the company.

I add one word more about compensation for dismissal of employés. I am by no means prepared to say that directors might not, and that a company might not, when a meritorious servant is leaving their service, present him with a £5 note, I should be very sorry to decide anything of the kind; but I say that there must be a limit, and the limit is what is necessary in the reasonable management of the affairs of the company.

Is there anything in the 91st section of the *Companies Clauses Act*, 1845, which alters that view of the law as to the remune-

(1) 24 W. R. 754.

C. A. 1883 HUTTON v. WEST CORK RAILWAY CO. Bowen, L.J.

ration of the directors? Sect. 90 is a section which deals with matters which are within the powers of the company, and gives the directors power generally to do all that the company may, but does not give them power to do more than the company may. Sect. 91 limits their powers as regards their own remuneration, because as regards their own remuneration the amount must be sanctioned by a general meeting. That does not enlarge the powers of the directors with regard to their remuneration.

Then take Lord Justice *Fry's* judgment, and what is the passage on which his view seems to turn? It is curious that Lord Justice *Fry* has not dealt in detail with the question of compensation for dismissal, and I should have been glad to know what his view was; but this is what he says with regard to remuneration for past services of the directors: "It appears to me, there is nothing whatever to prevent a general meeting from so voting remuneration for past services. To hold otherwise, would preclude directors from foregoing their right to remuneration when a company might be in trouble and difficulty, and asserting their moral right to remuneration when the company had become prosperous by reason of their services. Of course, if the majority of the shareholders present think it undesirable or improper to vote remuneration for past services the directors can have no claim whatever; but in case the majority think it reasonable and fit to vote a sum of money for past services, it appears to me a matter in which the majority can bind the minority." If that is meant as a simple test, I confess I do not agree with it, although I need hardly reiterate the respect I have for the opinion of the Lord Justice. If it means that within certain limits that is the test, I agree; but the ultimate test is not *bona fides*, but what is necessary for carrying on business. That is the test which Lord Justice *Fry* has not applied to this case.

Such is the general view of the law I should take about a company which was a going concern. Now let us see whether this company is a going concern in the same sense, and whether we have the same limit with regard to the payment of money. This particular company had been sold to the *Bandon Company*, and the purchase-money was to be assessed, and it was part of the scheme that at the time of transfer and payment of the purchase-

money all capital debts of the company should be and were extinguished. The company remained alive, as Mr. *Cozens-Hardy* has pointed out. That is true, but it remained alive only for certain purposes. It was not a going concern in the full sense of the term, nor was the venture any longer the ordinary venture of a railway company. It had a special and limited business, and that business was to preside at its own funeral, to wind itself up and carry on its own internal affairs until it had distributed the purchase-money in the way the Act of Parliament prescribed. If that be so, when one is applying the general test whether what has been done is incident to the business of the company, we have this further matter to recollect—what the business of this company is—and we have to ask ourselves whether these payments were necessary for that kind of limited business or could reasonably be said to be part of the business. Now the three material sections of the Act of Parliament are the 5th, 12th, and 14th. Sect. 5 defines the undertaking of the *West Cork Company*, which is to be transferred to the *Bandon Railway Company*. All the assets of the *West Cork Company*, with certain limitations that I need not deal with at the moment, are transferred to the *Bandon Railway Company*, and go with the undertaking. But further, and besides that, certain liabilities were part of the undertaking, and what those liabilities are, I think, is to be seen by referring to two matters, first, the fact that it was part of the scheme that all debts should be wiped off except revenue debts and charges strictly speaking; and, secondly, the proviso which reserves and attaches to the selling company (the *West Cork Company*) all debts properly so called, that is to say, liquidated sums due, as well as mortgage and other securities. The liabilities which were to go over, were such liabilities as had accrued and had not become debts. I do not say there were not many other kinds of liability which would not satisfy the word "debt," but there was this particular kind of liability suggested by Lord Justice *Cotton* during the argument, which is an important one. A railway accident may have occurred upon the day before the transfer and a man been killed, and the railway company would be liable to compensate the injured man's family. There would be that liability, and it would pass over to the new railway company, because it had not

C. A. 1883 HUTTON v. WEST CORK RAILWAY CO. Bowen, L.J.

ripened into a debt; but if at the time of the transfer it had ripened by verdict and judgment into a debt, it was attached to and still remained a burden upon the selling company. That section says nothing at all about such current expenses as might be incurred after the time of the transfer and during the limited operations of the company while winding itself up and directing the apportionment of the purchase-money, nevertheless the company was to survive for those purposes under sect. 14, which I refer to next, and which says that "from and after the completion of the *West Cork* transfer and the payment to them of the *West Cork* purchase-money, the *West Cork Company* shall be dissolved, excepting for the purpose of regulating their internal affairs and winding-up the same, and of applying the said purchase-money in accordance with the provisions of this Act." There must be some expenses connected with that dissolution. How are they provided for? They are provided for nowhere unless they come within the words in sect. 12, "revenue debts or charges." The purchase-money was to be paid over, and sect. 12 directs how it should be applied. In the first place, it is to go in paying their proportion of the costs of obtaining the Act, and incident to the arbitration and award that fixed the price to be paid; secondly, in paying off any revenue debts or charges of the *West Cork Company*, so far as the same may not already have been paid out of revenue, and subject thereto; and, thirdly, in distributing the balance of such purchase-money to and among the respective classes of debenture stockholders and preference and ordinary shareholders. The *West Cork Company* would have no money to pay these expenses incident to the termination of its own existence, unless they could be taken out of the purchase-money as revenue debts or charges under sub-sect. (*b*) of sect. 12 of the Act. I think that is an answer to a difficulty which I felt, but abandoned during the argument, as to whether these words "revenue debts or charges" could apply to anything but the revenue debts and charges which existed at the time of the completion of the transfer. If the company could expend the money for certain purposes, I think it must be held to include that. Mr. *Hardy* pointed out with great force that "revenue debts or charges" were probably words introduced not without reference to the *Railways Regulation Act*, 1868,

which deals with the administration of railway accounts, and which divides the capital account from the revenue account; and he urged upon us as a consequence that this would be a revenue charge, and that whatever would naturally fall under revenue charges and be properly charged to that particular account under the *Railways Regulation Act* might lawfully be paid under sub-sect. (*b*). I agree that if he could make out that this remuneration or compensation of the directors is a charge at all, it might properly be paid under sub-sect. (*b*), because it would be a revenue charge if a charge properly made. But with all respect to his argument the point where to me it seems to break down is this. Compensation, and gratuity for past services generally, without reference to such services as were rendered during the winding-up, can no longer be charges or expenditure reasonably incident to the carrying on—not the business of the old company—but what the business of the company would be for the purposes of its continued existence. It was moribund, and would only want to die in peace and distribute its assets, and it would not, as it seems to me, be proper to carry to the revenue account of such a company the money it voted to directors in a liberal spirit for what they had done in past years, or to a managing director for the disappointment and vexation of being deprived of an office for which he had been amply paid. The revenue debts and charges of the company must be viewed with reference to the qualified nature of its existence still left.

That being so, I think the resolution as to compensation is clearly wrong. The directors have no right to give it. It might in some instances be worth the while of a company to compensate a meritorious, but dismissed officer, but that kind of justification cannot exist in the case of a dying company. I think that makes the resolution bad, and I think it also renders it necessary to pass some fresh resolution, because I agree with Lord Justice *Cotton* that if the meeting has given over to the directors generally a surplus on the assumption that £1050 can be expended upon officials (which is not a correct assumption), and that the surplus would accordingly have to be increased by the £1050, it does not at all follow that it meant the directors to have that £1050. It seems to me, however, that the meeting has

C. A. 1883 HUTTON v. WEST CORK RAILWAY CO. BOWEN, L.J.

not considered it in the right view, and not measured it in the right measure.

I do not understand Lord Justice *Cotton* to say that no remuneration can be granted to the directors out of the purchase-money which is reasonably measured by the services they have rendered in winding up this company and in connection with the completion of the dissolution and transfer; but this resolution is couched in much wider terms and is evidently based upon the idea that they might be charitable with reference to past services done for the company at the time it was a going company, and I think a willing majority has no right to bind a dissentient minority by any resolution so conceived.

BAGGALLAY, L.J.:—

As the opinion which I have formed as to the manner in which this appeal should be dealt with is different from that formed by my colleagues, I should entertain considerable doubt as to the soundness of the conclusion at which I have arrived, were it not that the decision at which I have arrived is in accordance with that expressed by Lord Justice *Fry* at the time when he made the order from which this appeal is brought. Inasmuch as my decision can have no effect as regards the order which will be pronounced upon the present appeal, it will be sufficient if I simply indicate the outline of the grounds which appear to me to support the conclusion at which I have arrived.

At the time when the Act of Parliament was passed which authorized the *Bandon Railway Company* to purchase the undertaking of the *West Cork Railway Company*, the latter company was a going concern. The Act of Parliament was passed in the summer of 1879, and it gave power to the *Bandon Railway Company* to purchase the undertaking of the *West Cork Company*, and it authorized the price being regulated by arbitration. The agreement for the purchase was entered into between the two companies in the autumn of the same year, and the whole purchase was to be completed before the 1st of January, 1880. The price was ascertained before that day, and upon that day all the undertaking of the *West Cork Company* passed to the *Bandon Company*, but there was a proviso in the Act that when that

property had so passed the *Bandon Company* should not be liable for the claims of mortgagees and other creditors against the *West Cork Company*, all of which were to be paid and discharged by the *West Cork Company*. Then the 14th section was as follows:—[His Lordship read the section.] That is to say, the company was dissolved *quoad* outsiders, and it was to remain a company for the three purposes mentioned, namely, regulating its internal affairs, winding up the same, and applying the purchase-money in accordance with the provisions of the Act.

Now in my opinion the formation of a company and the winding-up of its affairs are portions of its business; its affairs are not concluded until the winding-up is at an end. I think that the purpose for which the company was to be treated as a living company, namely, the regulation of its internal affairs, extended to the regulation of all its internal affairs, whether such regulation was to be carried out through the medium of the directors, or through the medium of the shareholders, and that all its powers continued until the winding-up was completed.

Then the question arises, which is the substantial question here, whether during the interval between the time when the company was dissolved *quoad* outsiders, by reason of the undertaking being transferred to the *Bandon Company*, and the time when it should complete its affairs by distributing the balance of the purchase-money, which time has not yet arrived, it would be within the right of the company in regulating their internal affairs to fix the amount of remuneration to be paid to its directors and to fix the amount of compensation to be paid to its officers. I do not propose to enter into any detailed argument in support of the decision which I have formed. I adopt unreservedly the view expressed by Lord Justice *Fry* in his judgment as reported, but I would just direct attention to the 90th and 91st sections of the *Companies Clauses Act*, 1845. The latter provides for remuneration of the directors, and they are under the general head, "With respect to the powers of the directors and the powers of the company to be exercised only in general meeting." A company has the same powers of dealing with its affairs as an individual has, subject only to the restrictions imposed upon it by the terms of its incorporation. Some of those powers are to be

C. A. 1883 HUTTON v. WEST CORK RAILWAY CO. Baggallay, L.J.

exercised only by the directors, and others are only to be exercised under the power or control of a general meeting. The 90th section provides in general terms that the directors shall have the management and superintendence of the affairs of the company, and may lawfully exercise all the powers of the company, either under the *Companies Clauses Act* or under the special Act incorporating it, subject to the control and regulation of any general meeting; and sect. 91 is merely an exception from the general powers which sect. 90 confers upon the directors, and it says, as regards the particular powers therein mentioned, that they are only to be exercised at a general meeting of the company. Lord Justice *Fry* was of opinion that the general meeting of the company, as referred to in that section, though not so indicated there, should be an extraordinary one; that is to say, a meeting summoned with the formalities of an extraordinary meeting, and for that reason he thought it necessary to grant an injunction until an extraordinary meeting had been called and another resolution passed. Then a meeting was held and a resolution to the same effect as before was passed. One of the powers to be exercised by the general meeting as distinguished from the directors is the remuneration of the directors, auditors, treasurer, and secretary. They are all put in the same class there. It is not said there that the directors may receive a gratuity, and the auditors, treasurer, and secretary may receive remuneration. Although the directors cannot be called the servants of the company they are all persons entitled to have remuneration from the company in respect of services rendered to the company. I can see no difference as regards the provisions of the 91st section between a director and any other servant. It may be said, and I think very properly said, that until such time as a general meeting has fixed the amount of remuneration of the directors or of the treasurer or secretary, or any other officer, the person so indicated has not any right to demand his remuneration; but the power of granting remuneration is the same as regards one or other of the parties named, and having regard to the words of the section it can hardly be disputed that at any time before what I may call the dissolution of the company *quoad* outsiders, that is the first dissolution, it was in the power of a general meeting to

fix the amount of remuneration of the directors and of any other of the servants of the company. Having regard to the ordinary practice in these matters, with which we are all more or less acquainted, and having regard to the absence of any case in which remuneration voted to directors in respect of their services has been called into question and disallowed, I am of opinion that it was within the powers of the meeting at any time when the company was a going concern to pass a resolution and vote a a sum to the directors for past services as well as for future. As has been pointed out in the course of the argument, the first allowance of remuneration made to directors must be for past services, because no allowance can be made until after the first general meeting.

Am I then right in thinking that the company have the same powers after the first dissolution down to the time when the final dissolution takes place by reason of the affairs being completely wound up? Reading as I do sect. 14 of the Act so far as regards the power for regulating the internal affairs of the company, I think the power continues the same as it ever was down to the time when the purchase-money is to be ultimately divided according to the provisions of the Act; and that the same power of remunerating the directors for past services remained, and was a power of the company to be exercised by such one of its two bodies as had the duty imposed upon it of exercising that power.

But it is said that the business of the company is at an end; that the undertaking having been handed over to the *Bandon Company*, there is no longer any business to be done. A great deal remains to be done if I am right in saying that the winding-up of a company is as much part of the business of a company as its formation. It is asked what have the company to do in winding-up their affairs; they have to provide for the costs of and incident to the obtaining the Act, and also for the costs of and incident to the arbitration and the award, which could not take place until after the Act passed. Then they have to pay off any revenue debts or charges of the *West Cork Company*, so far as the same have not already been paid; and then subject

C. A. 1883 HUTTON v. WEST CORK RAILWAY CO. Baggallay, L.J.

thereto to distribute the ultimate balance. It can hardly be disputed that there may have been a number of debts and charges remaining at the time this Act of Parliament passed, which had to be paid off: and no other authority, no other persons, were appointed by this Act to carry out all those proceedings after the time when the Act became the law of the land. Nobody remained to conduct the business of the company except the directors, who are subject to the control of the general meeting. Many things yet remained to be done; there was a substantial amount of business to be carried on in various ways before the final dissolution could take place.

Then it is said that it would be a hard thing that a vote of this kind should be passed. But all the shareholders were represented at the meeting. If this had been the ordinary case of a company being wound up, where merely the ordinary shareholders would be the persons entitled to attend and vote, they might not possibly care how much of the money of the debenture holders might be paid in gratuities to officers or directors, or any one else; but here, under the scheme of arrangement, every one of the debenture holders had an opportunity of attending this meeting like the ordinary shareholders, and they attended and voted according to their qualifications. At this meeting the resolution was carried by a decided majority. It is suggested that there were only two opponents—the Plaintiff in the present action and his brother. However that may be, there is no suggestion that the meeting was not properly convened and properly held, or that the resolution was not properly passed, if the meeting had power to pass it. It is not, therefore, a question of hardship; it is not a question of how much business remained to be done; but it is simply and solely a question of whether the company was an existing company in respect of the regulation of its internal affairs. If I am right in that, the vote of remuneration to the directors is beyond all question. I am free to admit that there may be some question as regards the compensation to the officers for the loss, or supposed loss, of their places. The argument upon that has rather turned on the magnitude of the gift than on the principle. It is said that you must not be too nice as

regards a little matter: a small present of a few weeks' wages to a man who has done his work well is not important; but a large amount of compensation to men who have been faithful in the positions they occupied and who have done their work well for years, is not within the powers of the company. It is difficult to measure a case of the kind by the magnitude of the sum voted. Here there are officers who have discharged their duties and served the company well for a length of time; and is it beyond the powers of the company to vote a reasonable amount of remuneration to them for the services so rendered, and which, it is admitted, have been valuable services, when they are about to be deprived of the offices they hold? I should be very sorry to hold that it is beyond their powers. My only doubt is whether it was not within the power of the directors without the assistance of the shareholders. However, the mere fact of the shareholders at the meeting having passed the resolution is of no importance if that is so.

The only other matter to which I need allude is the £4000, out of which the directors were to pay a certain sum for expenses, a certain sum for compensation of officials, and a further sum by way of remuneration to themselves. The question has been raised whether, if the vote for giving £1050 as compensation to the officials is bad, the whole resolution is not bad. I should prefer taking it as a resolution in three parts—a resolution giving so much in respect of law expenses, so much to the officials, and so much to the directors.

For the reasons I have stated I think the conclusion Lord Justice *Fry* arrived at is the correct one, and I am sorry that my learned colleagues do not take the same view.

COTTON, L.J.:—

The order will be this, that the Plaintiff continuing the undertaking as to damages, there will be an injunction restraining the directors from paying or applying any part of the £141,934 in manner directed by the resolution of the 19th of April, 1883, otherwise than in providing for the costs and expenses therein mentioned.

C. A. 1883 HUTTON v. WEST CORK RAILWAY CO.

The order should also be without prejudice to the right of the general meeting to vote and of the directors to retain and apply any reasonable sum for the remuneration of the directors for their services since the 1st of January, 1880, in the winding-up of the company.

Solicitors for Plaintiff: *Robins & Cameron.*
Solicitors for Defendants: *Norton, Rose, & Co.*

M. W.

FRASER *v.* COOPER HALL & CO.
WADDELL *v.* FRASER.

[1881 F. 1230.]

V.-C. B.
1883
June 1.

Practice—Counter-claim against Non-party—Service necessary before Defendant to Counter-claim can appear—Rules of Court, 1875, *Order* XXII., *rr.* 5, 6, 7.

A person not a party to an action, when made a defendant to a counter-claim, is not entitled to enter an appearance *gratis*.

MOTION on behalf of *James Waddell* that an appearance entered on behalf of *Edward Charles Bowen*, as if a defendant to the above-mentioned counter-claim, be discharged, or taken off the file, and that such other order might be made in the premises as under the circumstances should be necessary or proper in order to determine that *Bowen* was not a party to such counter-claim, and to stay all proceedings therein on his part as pretending to be a party defendant thereto; and that *Bowen* be ordered to pay the costs of the application.

The original action was commenced by writ dated the 18th of July, 1881, and the statement of claim as delivered on the 16th of June, 1882, was by *Robert Fraser* and *John Hope Gordon*, on behalf of themselves and others, against *C. Cooper Hall & Co.* and four other Defendants.

By an order dated the 17th of February, 1883, another amendment was made whereby *James Waddell*, the trustee in the liquidation of *C. Cooper Hall & Co.*, was made a sixth Defendant.

On the 22nd of February, 1883, the Defendants *C. Cooper Hall & Co.* and *Waddell* obtained an order to amend their statement of defence, and to add a counter-claim. In the print of the re-amended defence and counter-claim (which as printed was stated to have been delivered on the 2nd of March, 1883), the name of *James Waddell* appeared as Plaintiff, and the names of *Robert Fraser*, *John Hope Gordon*, and *Edward Charles Bowen*, as Defendants.

In support of the motion it was deposed that whilst *Waddell's* solicitors were under urgency as to the time of delivery of the

V.-C. B.
1883
FRASER
v.
COOPER HALL & Co.
WADDELL
v.
FRASER.

re-amended defence and counter-claim, and were debating whether or not it was advisable to proceed against *Bowen* upon it, or to reserve the claim for an independent proceeding, the solicitors of the Plaintiffs in the original action, who were also *Bowen's* solicitors, asked *Waddell's* solicitors to supply them with a copy of the defence and counter-claim. The clerk to *Waddell's* solicitors said that he explained the circumstances, and informed them that they must not consider the counter-claim against *Bowen* as having been delivered to them as representing *Bowen*.

A correspondence then ensued:—

On the 9th of March *Bowen's* solicitors wrote:

"In the counter-claim of which you let us have a copy to-day, we find that you have made Mr. *Bowen* a Defendant, but he has not been served, nor have we on his behalf been asked to undertake to accept service. We shall be glad to have an explanation upon this point."

On the 21st of March *Waddell's* solicitors wrote:—

"We delayed answering your letter of the 9th, though we joined Mr. *Bowen* as a party to our counter-claim, under urgency as to the time of its delivery to Messrs. *Fraser*. We were doubtful whether after all it was worth while to proceed against him upon it, or rather to reserve a claim for an independent proceeding. . . . We reserve final consideration of the question as to proceeding against Mr. *Bowen* until we see what shape the railway company's claim takes."

On the same 21st of March *Bowen's* solicitors wrote a letter, which crossed the last, to say that they had that day entered an appearance for *Bowen* to the counter-claim, and enclosed duplicate notice of appearance.

On the following day they again wrote:—

"It seems to us that it would be impossible on behalf of the company to bring the suit to a hearing without having Mr. *Bowen* before the Court, and therefore, to save expense of making him Defendant to two counter-claims, we have entered and appear on his behalf to the one you have delivered, and shall put in his defence in due course."

On the 28th of March, *Waddell's* solicitors wrote:—

"We really do not understand yours of the 22nd instant at all. Not only is it not the case that our counter-claim has ever been served on Mr. *Bowen*, and that there is any pretence for assuming that it has been so, but our letter of the 21st instant was expressly written in answer to yours of the 9th instant, to point out why we have not proceeded and probably should not proceed to make Mr. *Bowen* a party.

"We therefore must call upon you forthwith to withdraw the appearance which you now state you have entered for Mr. *Bowen*. We need hardly add that it can be of no proper effect, but as it is an appearance it will otherwise be necessary for our clients to apply to the Court."

On the 30th of March, *Bowen's* solicitors took out a summons for time to put in a defence, which came on in Chambers on the 3rd of April, and was adjourned.

Some further letters followed; *Bowen's* solicitors refused to withdraw the appearance; and on the 27th of April they served *Waddell's* solicitors with what purported to be a statement of defence by *Bowen*. This document *Waddell's* solicitors refused to accept, and it was returned by them.

Notice of this motion was given on the 11th of May.

Joseph Beaumont, for the motion:—

Under the old procedure the practice of appearing gratis was condemned by Lord *Cottenham*, C., and in *Attorney-General* v. *Gibbs* (1) he refused to sanction such an appearance.

But the old practice, whatever it may have been, is superseded by the new procedure laid down in Order XXII. Rule 6 is explicit and precise, that a person not a party when made a defendant to a counter-claim "shall be summoned to appear by being served with a copy of the defence." In no other way can a person, not an original party, be made a defendant.

Hemming, Q.C., and *Maidlow*, for the Respondent *Bowen*:—

The right of a defendant under the old practice to appear, whether served with process or not, is abundantly clear, and was

(1) 2 Ph. 327.

V.-C. B.
1883
FRASER
v.
COOPER HALL & Co.
WADDELL
v.
FRASER.

laid down as early as in 1787 by Lord *Hardwicke* in *Fell* v. *Master of Christ's College, Cambridge* (1).

The *Judicature Acts* and Orders have not taken away this right. Rule 6 of Order XXII. no doubt prescribes how a defendant may be compelled to appear, but it says nothing about his right to appear voluntarily, if not served. Rule 8 illustrates this. It says, "Any person named in a defence as a party to a counter-claim," that is, any person named, whether served or not, "may deliver a reply," and so on. The old Common Law practice was substantially the same as in Chancery. "The defendant should not appear after notice not to do so, and that the writ is abandoned. But, unless such notice be given, he may enter an appearance as soon as the writ is issued, and waive the service; but his doing so will entitle the plaintiff to declare forthwith:" *Lush's* Practice (2). The practice since the *Judicature Act* is stated in the same way in the more recent text-books. "An appearance may be entered for a defendant, although he has not been served with a copy of the writ of summons. This may be done when his solicitor has accepted service and undertaken to appear; and is also adopted where a plaintiff has served some only of the defendants with the writ of summons, and a defendant who is not served wishes to make an immediate application to the Court in the cause": *Daniell's* Ch. Prac. (3), referring to *Fell* v. *Master of Christ's College.*

It has been decided by the Court of Appeal that a counter-claim is so far an independent action that it may be continued, though proceedings in the first action have been discontinued: *McGowan* v. *Middleton* (7th April, 1883).

BACON, V.C.:—

This case has been elaborately argued, but it really involves a very simple point.

Counter-claims, though they are to be treated for some purposes, as in the case Mr. *Maidlow* has cited, as independent actions, are the creatures only of the statute. They did not exist in any form or kind until this Act was passed. The *Judicature Act* has

(1) 2 Bro. C. C. 279. (2) Page 392.
(3) 4th Ed., vol. i. p. 350.

introduced an entirely new practice, and in ascertaining that practice, the rules must be construed according to the words used.

In the rules which form part of the statute provision is made for a wholly new course of procedure. The subject is introduced in the following order. The 5th rule of Order XXII. may be briefly referred to. It orders a defendant to add to the title of his defence a further title, setting forth the names of his defendants, and adds, "and shall deliver his defence" to such of them as are parties to the action. Then rule 6 applies to persons who are not parties to the action, which is the present case. It says that any such person "shall be summoned to appear by being served with a copy of the defence; and such service shall be regulated by the same rules as are hereinbefore contained with respect to the service of a writ of summons." Then, in order to compel appearance, rule 7 provides that any person not a defendant to the action, who is so served, "must appear thereto, as if he had been served with a writ of summons."

What authority or what right have I to resort to another course of procedure, when I am dealing only with what I find declared in these rules? Until such service as is mentioned in rule 7 is properly made, no man has a right to be treated as a defendant or to enter an appearance.

After the correspondence that has been read, it is perhaps not surprising that an appearance should have been entered for Mr. *Bowen;* but under the circumstances it is a mere nullity. If the Plaintiffs in the counter-claim insist as a matter of right that the name *Bowen* be left out of the counter-claim, I think they are entitled to that which they contend for. I think the appearance must be discharged, and the statement of defence and counter-claim must be amended by striking out the name of *Bowen* from the list of Defendants to the counter-claim.

Solicitors for the original Plaintiffs: *Wainwright & Baillie.*
Solicitors for the original Defendants: *Bircham & Co.*

J. B. D.

C. A.
1883
FRY, J.
Feb. 1.
C. A.
Feb. 14.

HICKSON *v.* DARLOW.

[1883 H. 109.]

Unregistered Bill of Sale—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 8—*Mortgagor and Mortgagee—Staying Sale—Payment into Court.*

The *Bills of Sale Act*, 1882, sect. 8, which makes a bill of sale void unless it is registered within seven clear days after execution, does not avoid an unregistered bill of sale which was executed more than seven clear days before the Act came into operation.

The general rule is that a sale by a mortgagee will be restrained only on payment into Court by the mortgagor of the amount which the mortgagee swears to be due to him, but this does not apply where the Court can see on the terms of the deed that this amount cannot be due on the security.

Hill v. *Kirkwood* (1) considered.

By an indenture dated the 5th of October, 1882, between the Plaintiff of the one part, and the Defendant of the other part, reciting that the Plaintiff had applied to the Defendant for an advance of £25 which the Defendant had agreed to make upon having the repayment thereof, with the sum of £32 10*s.* interest and charges, making in all £57 10*s.*, thereinafter called the advance, secured to him in manner thereinafter appearing, the Plaintiff, in consideration of £25, expressed to be received from the Defendant, assigned to the Defendant certain furniture and household effects, with a proviso for redemption if the Plaintiff should pay to the Defendant the £57 10*s.* by the following instalments, namely, 6*s.* 3*d.* weekly for 104 weeks, commencing on the 9th of October, 1882, and the balance of £25 on the 10th of October, 1884. "And the mortgagor doth hereby covenant with the mortgagee that she will pay the mortgagee the said sum of £57 10*s.* without any deduction." It was provided that upon any breach of any of the covenants or conditions by the Plaintiff therein contained, or if default should be made by the Plaintiff in payment of the said advance, it should be lawful for the Defendant to take possession of the mortgaged property and to sell it, and receive the moneys arising therefrom, "and retain to the mortgagee thereout all

(1) 28 W. R. 358.

moneys remaining due on the security of these presents," and all such expenses as therein mentioned, and that the surplus, if any, of such moneys should be paid to the Plaintiff.

This deed was not registered as a bill of sale.

On the 6th of January, 1883, the Plaintiff commenced this action to have the deed delivered up to be cancelled, and to restrain the Defendant from interfering with the property comprised in it. The writ was served on the 8th of January.

The Plaintiff paid the weekly instalments of 6*s.* 3*d.* down to the 5th of January, 1883, inclusive. The payments so made amounted to £3 8*s.* 9*d.*

On the 16th of January, 1883, the Defendant instructed an auctioneer to take possession of the goods on the ground that the Plaintiff was in arrear with her weekly instalments, and had in other respects broken the covenants contained in the deed.

The Plaintiff, on the 1st of February, 1883, moved for an injunction to restrain the Defendant from taking possession of, removing, selling, or otherwise interfering with the mortgaged property, or otherwise exercising the powers and authorities contained in the bill of sale. There was a conflict of evidence as to whether nearly so much as £25 had ever been really advanced by the Defendant.

Nalder, for the Plaintiff:—

The bill of sale is void under the new Act, being unregistered.

The words of the 8th section of the Act of 1882 (45 & 46 Vict. c. 43) are unqualified, and are intended to apply to bills of sale which are not duly registered under the old Act.

Melville, for the Defendant:—

The Act is not retrospective, and the bill of sale is good as against the grantor: *Hill* v. *Kirkwood* (1); *Davis* v. *Goodman* (2).

FRY, J.:—

The first question I have to decide is a short one, arising upon the *Bills of Sale Amendment Act*, 1882. The 8th section of that Act

(1) 28 W. R. 358. (2) 5 C. P. D. 128.

C. A. 1883 HICKSON v. DARLOW. Fry, J.

provides that every bill of sale shall be registered under the principal Act within seven clear days after execution thereof; otherwise such bill of sale shall be void in respect of the personal chattels comprised therein.

It appears that this bill of sale was executed on the 5th of October, 1882, before the Act I have just referred to came into operation, the date for the commencement of the Act being fixed for the 1st of November, 1882.

The question is whether the bill of sale, which was not registered, but which, according to the case of *Davis* v. *Goodman* (1), decided under the principal Act, was nevertheless valid as between the grantor and grantee under the law before the Act, is valid, notwithstanding the provisions of the 8th section of the *Amendment Act*.

Now it is a well-known principle of law on the construction of Acts of Parliament, and especially when the rights and liabilities of persons are altered thereby, that they are not to have a retrospective operation unless it is expressly so stated. Besides which it is to be observed that this Act does not use retrospective language, but says that the bill of sale shall be duly registered, and throughout uses words of futurity.

If I were to hold that this statute was retrospective the holder of such a bill of sale as this would be put under great hardship, for he would be required to register the bill of sale within seven days from the execution thereof, which seven days expired before the Act came into operation, so that the statute would be taking away from the holder his right previously existing without giving him any opportunity of conforming to that provision of the statute.

No doubt a difficulty arises from the words of the 3rd section of the *Amendment Act*, which says that that Act "shall not, unless the context otherwise requires, apply to any bill of sale duly registered before the commencement of the Act," for it would be the natural inference from those words that the clauses of the Act, including the 8th clause, do apply to bills which are not duly registered under the principal Act. But I do not think that this argument, which is matter of inference, is sufficient to outweigh the considerations arising from the language of the statute and

(1) 5 C. P. D. 128.

the general rule that such an Act of Parliament as this is not to be retrospective.

C. W. C.

Mr. Justice *Fry*, however, was of opinion that though the bill of sale was not void as between grantor and grantee on the ground of want of registration, there was a question to be tried as to its validity, and that an injunction ought to be granted, but only on the terms of the Plaintiff paying the £57 10*s.* into Court. The Plaintiff appealed, and the appeal was heard on the 14th of February, 1883.

Nalder, for the Plaintiff:—

It is submitted that the bill of sale is void as against the Plaintiff for want of registration. Sect. 8 of 45 & 46 Vict. c. 43, makes a bill of sale void which is not registered, and sect. 3 provides that the Act shall not apply to a bill of sale duly registered before the commencement of the Act, which implies that it does apply to bills of sale executed before the commencement of the Act but not registered. Sect. 15 repeals sect. 8 of 41 & 42 Vict. c. 31, with a saving which does not protect an unregistered bill of sale. A clause in the *Mercantile Law Amendment Act*, 19 & 20 Vict. c. 97, very similar to sect. 8 of the present Act, was held retrospective in *Cornill* v. *Hudson* (1) and *Pardo* v. *Bingham* (2).

[BOWEN, L.J.:—If the Legislature had meant what you say, it surely would have said that all unregistered bills of sale should be void.]

If the Court is against me on that I say that the order should have been made on payment into Court of £25 capital with interest up to date, for the Defendant, under the terms of the power of sale, could only pay himself what was due up to the time.

Melville, contrà, was desired to confine himself to the question as to the amount to be paid into Court.

The Defendant must pay into Court the whole amount which

(1) 8 E. & B. 429. (2) Law Rep. 4 Ch. 735.

C. A. 1883

HICKSON v. DARLOW.

the Plaintiff claims, as was decided by the Court of Appeal in *Hill* v. *Kirkwood* (1).

[JESSEL, M.R.:—The judgments in that case do not bear out the head-note.]

JESSEL, M.R.:—

It is, in our opinion, clear that the Act 45 & 46 Vict. c. 43, s. 8, does not apply to the present bill of sale. It appears to us impossible to read it as so applying, for it enacts that a bill of sale shall be registered within seven clear days after its execution. But the bill of sale in the present case was executed more than seven clear days before the Act came into operation, so that to read it as applying to this bill of sale would be making it enact an impossibility.

As to the other point, the case of *Hill* v. *Kirkwood* does not bear out the proposition for which it was cited. All that the Court there decided was that the ordinary practice in cases between mortgagor and mortgagee was to be followed, namely, that on an application by a mortgagor to stay a sale, if the mortgagee swears that an amount which, consistently with the terms of the mortgage, may be due to him, is due, that is the amount which the mortgagor must bring into Court. Here, I think that only £25 with interest is due, and that the Plaintiff ought only to be required to bring £30 into Court. I do not see anything in the deed which entitles the mortgagee to be paid the instalments by anticipation.

LINDLEY, L.J.:—

I am of the same opinion. It appears to me impossible to read the 8th section of the Act as retrospective to the extent contended for. As regards the other point, I think that consistently with the practice of the Court the amount to be paid into Court may be reduced. Taking the mortgage deed as shewing the maximum amount that can be due, the Court, for the present purpose, gives credit to the affidavit of the mortgagee as to any sum less than that maximum being due; but the Court is not bound to attend

(1) 28 W. R. 358.

C. A. 1883 HICKSON v. DARLOW.

to his affidavit if he swears that a sum is due which, according to the terms of his security, cannot be due upon it. No point of that kind was before the Court in *Hill* v. *Kirkwood* (1). Here it appears to me that at present only £25 with interest is due, and, having regard to the nature of the case, as shewn in the evidence, I agree that it is enough to require the Plaintiff to bring £30 into Court.

BOWEN, L.J. :—

I am of the same opinion on both points.

Solicitors for Plaintiff: *Collyer-Bristow & Co.*
Solicitors for Defendant: *Gregory, Rowcliffes, & Co.*

H. C. J.

Ex parte HILL. *In re* BIRD.

C. A. 1883 C. J. B. *Feb.* 26. C. A. *May* 24, 31.

Fraudulent Preference—Motive of Debtor—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 92.

In order that a payment of money or a transfer of property made by a debtor in favour of one of his creditors should be void as a fraudulent preference under sect. 92, it is sufficient that the preferring the creditor should have been the substantial, effectual, or dominant view with which the debtor made it; it is not necessary that it should have been his sole view.

A. BIRD was a retail grocer at *Great Ellingham*, in *Norfolk*. He was in the habit of purchasing goods for the purpose of his business from Messrs. *Bennett & Hill*, wholesale grocers in *Norwich*, on the terms that ten weeks credit should be allowed him. On the 2nd of October, 1882, he executed a bill of sale of his stock-in-trade and all other his property, except his book-debts, to *Henry Feldman*, a money lender in *Norwich*, to secure a sum of £140, principal and interest. This bill of sale was duly registered, and in this way *Bennett & Hill* became aware of its execution, and on the 12th of October, *D. J. Hill*, one of the partners in the firm, went with his solicitor to *Great Ellingham*, and had an interview with *Bird* with reference to the amount due from

(1) 28 W. R. 358.

C. A. 1883 *Ex parte* Hill. *In re* Bird.

him to the firm. They had supplied him with goods to the value of £120, for which he had not paid, but no part of that sum was then actually due from him, inasmuch as the period of credit had not expired, but between £60 and £70 of the amount would become due before the end of October. At this interview it was arranged that *Hill* should advance £270 to *Bird*, and that *Bird* should execute in favour of *Hill* a bill of sale of his stock-in-trade and all other his property (except his book-debts) to secure the £270, and that of the £270 £140 should be employed in paying off *Feldman*, and £130 in paying the £120 to *Bennett & Hill*, and £10 for the costs of the preparation of the bill of sale and of a writ which they had issued or were about to issue against *Bird*. It was also arranged that *Feldman's* bill of sale should be transferred to *Hill* on his paying the £140. A bill of sale was accordingly executed the same day by *Bird*, the deed purporting to be made in consideration of £270 then advanced to him by *Hill*. *Hill* drew two cheques, respectively for £140 and £130, on a private account which he had opened for the purpose with a bank, and handed them to *Bird*, who at once handed them back to *Hill's* solicitor, who was to pay off *Feldman*, to pay *Bennett & Hill*, and to retain the costs. The £270 had been in the first instance obtained by *Hill* from his solicitor on a mortgage of some leasehold property, but it was afterwards repaid out of partnership moneys of *Bennett & Hill*. On the 13th of October, 1882, the £140 was paid to *Feldman*, and he signed an undertaking to transfer his bill of sale to *Hill*. A transfer was afterwards executed, dated the 13th of October, 1882, but it was not actually executed till some days later. On the 20th of October, 1882, *Bird* filed a liquidation petition in the *Norwich* County Court, under which a trustee was appointed on the 6th of November. *Hill*, who had taken possession of the goods comprised in his bill of sale on the 18th of October, was about to sell them, and to prevent this the trustee paid him £270 under protest, and then applied to the County Court for an order declaring *Hill's* bill of sale void as against him. *Bird* was examined on the hearing of this application, and said, "I was induced to give the bill of sale, because I had heard that *Feldman* was likely to come down upon me at a moment's notice, and because

Mr. *Hill* offered to pay him off and *Bennett & Hill's* account. *Feldman* had never applied for payment of his bill of sale."

Hill, who was also examined, said, "I reminded *Bird* that he owed us £120. I asked him for the money as representing our firm. He said he could not pay us. I said, this gentleman is my solicitor, and he has instructions from me to serve you with a writ. I did suggest a bill of sale after the writ was shewn to *Bird*. I went prepared to advance these two sums of money to *Bird*. I had arranged that with my solicitor. I told *Bird* I would advance the money if he would execute a bill of sale. I advanced the money with a view to our firm's debt being paid."

It appeared that *Hill's* solicitor shewed *Bird* a writ in an action against him by *Bennett & Hill*, but it did not appear that the writ was ever formally served on *Bird*.

The County Court Judge held that the bill of sale was void as against the trustee, both as a fraudulent preference and as an act of bankruptcy.

Hill appealed to the Chief Judge. The appeal was heard on the 26th of February, 1883.

R. Vaughan Williams, for the Appellant:—

The judgment of the County Court Judge found this to be a fraudulent conveyance.

The question is, what was the motive of *Bird*. If his motive was to favour this particular creditor, the transaction would be void under the 92nd section. But there is no evidence of any particular *animus* in favour of *Bennett & Hill*. *Bird's* property was in such a condition as that he was unable to pay his debts. The object of giving the bill of sale to *Bennett & Hill* was to prevent a seizure by *Feldman*, which was said to be imminent.

Finlay Knight, for the Respondent, was not called upon.

BACON, C.J.:—

In my opinion a more clear case, or one more totally unarguable, was never submitted to the Court.

Mr. *Williams'* contention is without a shadow of support. His client himself says, in the affidavit which has been read, "Our

C. A. 1883 *Ex parte* Hill. *In re* Bird. C. J. B.

object in taking the security was to get security for our debt." The case is quite plain. By a contrivance, this Appellant, without parting with a shilling of his money, except what he paid off to the former bill of sale holder, and which sum the bill of sale holder, it seems, is now in a fair way of losing, changed a book-debt which was due to him into a debt secured by a bill of sale, which was given to secure that debt, and nothing else. The farce of exchanging cheques and drawing a cheque in favour of the debtor, which he was induced to indorse to the firm and hand over, was a piece of mere acting—mere nonsense.

The transaction was, in my judgment, a gross fraud. The order appealed from was perfectly right, and the appeal must be dismissed, with costs.

J. B. D.

From this decision *Hill* appealed. The appeal was heard on the 24th and 31st of May, 1883.

R. Vaughan Williams, for the Appellant:—

The execution of the bill of sale was neither a fraudulent preference nor an act of bankruptcy.

In order that the bill of sale should be void as a fraudulent preference under sect. 92 (1), it is necessary that the desire to prefer the creditor should have been the debtor's sole motive in executing it: *Brown* v. *Kempton* (2). The law in this respect has not been altered by sect. 92: *Ex parte Topham* (3); *Ex parte Blackburn* (4); *Butcher* v. *Stead* (5); *Ex parte Tempest* (6). Here it is plain that the motive of *Bird* was to substitute *Hill*, who was

(1) Sect. 92: "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own moneys in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same become bankrupt within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this Act; but this section shall not affect the rights of a purchaser, payee, or incumbrancer in good faith and for valuable consideration."

(2) 19 L. J. (C.P.) 169.

(3) Law Rep. 8 Ch. 614.

(4) Ibid. 12 Eq. 358.

(5) Ibid. 7 H. L. 839.

(6) Ibid. 6 Ch. 70.

likely to be more lenient to him, as the holder of the first bill of sale, instead of the money-lender.

[BOWEN, L.J., referred to what he said in *Ex parte Griffith* (1).]

At any rate the bill of sale was *bonâ fide* as regarded *Hill*, and he is protected by the proviso at the end of sect. 92. Moreover, the evidence shews that there was sufficient pressure by *Hill*.

As to the act of bankruptcy, when sub-sect. 2 (2) of sect. 6 speaks of a "fraudulent conveyance" it does not refer to a personal or moral fraud, but to legal fraud,—fraud depending on the effect of the debtor's act: *In re Wood* (3). It is necessary that the deed should have the effect of defeating or delaying the creditors of the grantor. But here the debtor had already by the bill of sale to *Feldman* parted with the whole of his legal property in the goods, and therefore the execution of the second bill of sale in no way affected the legal remedy of the creditors by *fi. fa.*

[COTTON, L.J.:—If your argument is right, a man who once assigns the whole of his property as security for a small advance can deal with the equity of redemption in any way he pleases in defiance of the bankruptcy law.]

The transaction did not diminish the common law remedy of the other creditors. The question is whether the necessary effect of the deed was to produce insolvency: *Smith* v. *Cannan* (4).

[COTTON, L.J.:—If the effect of a deed is to put so much of a man's property beyond his control that he will not be able to pay his debts, does it not make him insolvent? I cannot see that any present advance was made by *Hill* to *Bird*.]

An advance to pay off an existing secured creditor is a present advance: *Whitmore* v. *Claridge* (5).

[COTTON, L.J.:—I think the real object was to obtain security

(1) *Ante*, p. 69.

(2) Sect. 6 provides that the following acts or defaults are to be deemed to be "acts of bankruptcy" (*inter alia*):

Sub-sect. 2: "That the debtor has, in *England* or elsewhere, made a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof."

(3) Law Rep. 7 Ch. 302.

(4) 2 E. & B. 35.

(5) 31 L. J. (Q.B.) 141; 33 L. J. (Q.B.) 87.

C. A. 1883 *Ex parte* HILL. *In re* BIRD.

for the debt due to *Hill's* firm, and that the debt due to *Feldman* was paid off with a view in some way to better *Hill's* security.]

At any rate *Feldman's* was a good security, and *Hill* is entitled, as transferee of his bill of sale, to retain the £140 secured by it.

BAGGALLAY, L.J.:—We do not wish to hear the trustee's counsel as to the £130. But if they insist on the £140 being repaid we must hear them.

Winslow, Q.C., and *Finlay Knight*, for the trustee:—

The question of the validity of *Feldman's* bill of sale was not really raised either in the County Court or before the Chief Judge, and there is no evidence upon it. We will assent to an order for the repayment of the £270 without prejudice to any future application by *Hill* for the £140.

[COTTON, L.J.:—I think we could only order the £130 to be repaid by *Hill* without prejudice to any application by the trustee for the repayment also of the £140.]

We will accept an order in that form.

BAGGALLAY, L.J. (after stating the facts and referring to sect. 92), continued:—

I am bound to say that I entirely concur in the view expressed by the County Court Judge that the transaction was a sham, that what was done was done by way of a blind to conceal the real transaction. I agree also with the Chief Judge that the whole thing was a farce. It is almost impossible, having regard to all the circumstances, to come to any other conclusion. The principles upon which sect. 92 ought to be construed have been repeatedly considered by the Court of Appeal, and the books are full of reports of cases bearing on the effect of the section; whatever may be said as to particular expressions which have been used in different judgments, we are driven back in all cases to the simple words of the section, that a conveyance made by a debtor who is insolvent in favour of any creditor, "with a view of giving such creditor a preference over the other creditors," is to be deemed fraudulent and void as against the trustee in his

C. A. 1883 *Ex parte* HILL. *In re* BIRD. Baggallay, L.J.

bankruptcy if the debtor becomes bankrupt within three months after making it. That is what the Act says. I do not propose to refer to any of the cases which have been cited, except *Ex parte Topham* (1). In that case no doubt Lord Justice *Mellish* adopted in general terms, as "an accurate description of the state of the law," the observations which had been made by the Chief Judge in *Ex parte Blackburn* (2). The Lord Justice quoted (3) the language of the Chief Judge, including this sentence, "so that unless it can be made clearly apparent, and to the satisfaction of the Court which has to decide, that the debtor's sole motive was to prefer the creditor paid to the other creditors, the payment cannot be impeached, even although it be obviously in favour of a creditor." As applied to the particular case which was then before him it does not appear to me that the language used by the Chief Judge was too strong. Lord Justice *Mellish* said that this, in his opinion, was a perfectly accurate description of the state of the law. If he meant to adopt the expressions of the Chief Judge without any qualification, those expressions were, in my opinion, too strong to be generally applicable. All that sect. 92 says is that the conveyance must be made "with *a* view of giving such creditor a preference"; it does not say with the *sole* view. I understand it to mean that the substantial object or view must be the giving the creditor a preference, and that the mere fact that besides that view there may have been also some view of an advantage to be gained by the person who makes the preference does not alter the case, or prevent the application of sect. 92. In the particular case before him, Lord Justice *Mellish* had no occasion to consider the nice distinction between the substantial view and the sole view of preferring the creditor, because he came to the conclusion that there was no intention of making any fraudulent preference at all. In the present case, on the contrary, I am unable to discover any motive whatever on the part of *Bird* but that of giving a preference to *Hill*. The simple object was to obtain a security for the existing debt due to *Hill's* firm, or for that which would soon ripen into a debt, and it was thought advisable as a matter of prudence that *Hill* should get in the debt due to the money-

(1) Law Rep. 8 Ch. 614. (2) Law Rep. 12 Eq. 364.
(3) Law Rep. 8 Ch. 619.

C. A. 1883 *Ex parte* HILL. *In re* BIRD. Baggallay, L.J.

lender. I come then to the conclusion that the transaction amounted to a fraudulent preference. But it appears to me equally clear that it was an act of bankruptcy. The effect of it was to place the whole of the debtor's property beyond the reach of his creditors. Mr. *Williams* says that as the bill of sale dealt only with an equity of redemption, and not with the goods themselves, it did not affect the legal remedies of the creditors. I am unable to follow this argument, for, on paying off *Feldman*, *Hill* had the whole of the debtor's property at his command, and the remedies of the other creditors were interfered with just as much as if his had been the original bill of sale. It only remains to consider what ought to be done as to that which I may call the money part of the order. The trustee says that he paid over the £270 to *Hill* under protest, but this is denied. I think, however, that if it was improperly paid it ought to be repaid. It appears to me that the trustee is clearly entitled to so much of the £270 as went to pay the debt of *Bennett & Hill*, for they had no right to that money except under the deed, which I have already held to be fraudulent and void as against the trustee. If *Hill* has any right at all it is as transferee of *Feldman's* bill of sale, but the materials at present before us are not sufficient to enable us to determine this question. Therefore I think the order should be only for repayment of the £130, but without prejudice to any further application by the trustee for the £140.

COTTON, L.J. (after expressing his opinion on the evidence that the bill of sale was in substance an assignment of the whole of the debtor's property as security for the antecedent debt due to *Bennett & Hill*, without any fresh advance of which the debtor got the benefit), continued:—

This is sufficient to dispose of the case. But I do not wish it to be supposed that I do not think the transaction was also a fraudulent preference, and I will therefore deal with that point also. It is said that pressure was exercised by *Hill*, and it is also said that there was another motive on the part of *Bird* besides that of giving a preference to *Hill*. It is said that he wished to put in the place of *Feldman* the other creditor *Hill*, who was likely to be more lenient to him. Even if we are to refer to the

old cases on the subject, I do not think the existence of that other motive would prevent the execution of the bill of sale from being a voluntary act on the part of *Bird*. It is said pressure was exercised by *Hill*, because a writ was shewn to *Bird* at the interview on the 12th of October. But it does not appear that any attempt was made to serve the writ, it was only taken by the solicitor in his pocket in order that he might shew it to *Bird*. And we cannot disregard the conclusion which was arrived at by the County Court Judge, who saw the witnesses, that the whole transaction was a sham, or that of the Chief Judge, that it was a farce. In my opinion it is correctly so described. That being so, we must come to the conclusion that there was a fraudulent preference. We have to deal with the language of sect. 92. It is unnecessary to consider in the present case whether the right construction is that the sole motive of the debtor must be the desire to give a preference to the particular creditor, for here, in my view of the facts, there is no evidence of any other motive than a desire to prefer *Hill*. It is suggested that there was another motive in the wish of *Bird* to obtain a more liberal creditor than *Feldman* as the holder of the first bill of sale, but in my opinion that will not do. The Act requires only that the substantial motive of the transaction should have been the wish to prefer the creditor, and you cannot get rid of the provision by shewing the existence of some such other motive as that which is suggested. I doubt whether in *Ex parte Blackburn* (1) the Chief Judge intended to lay such stress on the word "sole." He determined that case upon its facts. And in *Ex parte Topham* (2) it was not necessary for Lord Justice *Mellish* to consider the point. I must, however, say that in my view of sect. 92 it is not necessary to shew that the debtor's sole motive was to give a preference to the creditor; the section only says "with a view of giving such creditor a preference over the other creditors." I agree, therefore, in the order proposed by Lord Justice *Baggallay*.

BOWEN, L.J.:—

I am of the same opinion, and I will add only a few words. I

(1) Law Rep. 12 Eq. 364. (2) Law Rep. 8 Ch. 614.

C. A. 1883 *Ex parte* HILL. *In re* BIRD. Bowen, L.J.

think that the execution of this bill of sale was an act of bankruptcy, and I am equally of opinion that it was a fraudulent preference under sect. 92. I am very glad to find that the other members of the Court think, as I certainly do, that in construing sect. 92 we ought to look to its words, and to keep them in view as our compass by which to steer. I think it is not necessary now to come to an absolutely final conclusion on all the points which have been argued, but still I should like to express my opinion. The *Bankruptcy Act* of 1869 has, by sect. 92, consolidated or codified the law relating to fraudulent preference. Whether it has or has not altered the old law is not a matter that need be decided, though there is considerable authority for saying that it has not. But, however that may be, we have to look to the words of sect. 92, and they are "with a view of giving such creditor a preference over the other creditors." There are only three conceivable meanings which these words can have. (1.) They may conceivably mean the case where the debtor has present to his mind as one view, among others, the giving a preference to the particular creditor. I do not think that this is the true interpretation of the words; (2.) Another possible construction of the words is to read them as equivalent to "with *the* view"—the real, effectual, substantial view—of giving a preference to the creditor, the word *a* being equivalent to *the*. I think that this is the correct interpretation; (3.) The other conceivable construction is to treat them as equivalent to "with the sole view or sole motive." I should prefer keeping to the word "view" instead of "motive," though in nine cases out of ten the two words may come to the same thing. Is then the expression "with a view," convertible into "with the sole view"? My answer is that the latter words are not in the Act, and I do not wish to lay down that they mean the same thing as the words which are in it. It is an exceedingly difficult thing (it is possible, no doubt, for juries may have to do it), to arrive at an opinion as to what is the dominant or operative motive of a man in doing a particular act. But if we are to consider whether amongst all the shadows which pass across a man's mind, some view as well as the dominant view influenced him to do the act, we shall be embarking on a dark and unknown voyage across an exceedingly misty sea. It

is a very difficult matter to prove that the dominant motive was the sole motive, and I think the true test under sect. 92 is this: (1), had the debtor a view of giving a preference to the creditor? and (2), was that the operative effectual view? That appears to me to be the right construction of sect. 92, though it is not absolutely necessary to decide it now. Bankruptcy law, however, is a matter in which it is so important to keep the propositions of law distinct from their application to the facts, that I have thought it right to say what I have said, and I do not think I have said anything contrary to any of the decided cases. If that is the law the question which we have to decide is one of fact, and I answer that question as I did in *Ex parte Griffith* (1). I think that this bill of sale was executed by *Bird* with the view (among others), of preferring *Hill*, and further, that that was the dominant and substantial view. But I go further, and I say that I can detect no other view, and, if it were necessary so to decide, I should say that *Bird* acted with the sole view of preferring *Hill*. An elaborate farce was devised to disguise the real truth, but the eyes of common sense can see through it.

Solicitor for Appellant: *P. J. Burt*, agent for *Bavin & Daynes, Norwich.*

Solicitor for Trustee: *C. F. Martelli*, agent for *Alfred Kent, Norwich.*

(1) *Ante*, p. 69.

W. L. C.

C. A.
1883
June 12.

Ex parte ENGELHARDT. *In re* ENGELHARDT.

Composition Resolutions—Debtor's Statement of Affairs—Misstatement of Debt—Action by Creditor—Injunction—Correction of Error—Delay—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 126—*Bankruptcy Rules*, 1870, *r.* 306.

A liquidating debtor in his statement of affairs by mistake inserted the amount of the debt due by him to one of his creditors as £17, the amount being really £17 15*s.* :—

Held, that the creditor was not bound by composition resolutions which were passed by the statutory majority, but to which he did not assent.

Held, also, that, after a delay of four months from the time when the debtor first became aware of the mistake, the Court would not restrain the creditor from proceeding with an action for the debt, even for the purpose of enabling the debtor to summon a general meeting of his creditors, under rule 306, in order to obtain their assent to the correction of the mistake in the statement of affairs.

Per FRY, L.J. :—Whether, having regard to the negative words of sect. 126, an injunction could be in any case granted for such a purpose, *quære*.

Burliner v. *Royle* (1) approved.

THIS was an appeal from a decision of Mr. Registrar *Brougham*, acting as Chief Judge in Bankruptcy.

On the 30th of November, 1882, *J. G. Engelhardt*, a baker, filed a liquidation petition. The first meeting of the creditors was held on the 18th of December, 1882. In the statement of his affairs produced by the debtor at the meeting, Messrs. *Powers & Son* were inserted as creditors for £17 in respect of flour supplied by them to him. No invoice had been delivered to him when the flour was delivered, and he assumed, without inquiry, that £17 was the amount which would be charged for it. The price of the flour in fact amounted to £17 15*s.* At this meeting it was resolved by the statutory majority that a composition of 7*s.* 6*d.* in the pound should be accepted, payable 3*s.* in one month, 3*s.* in two months, and 1*s.* 6*d.* in four months, respectively from the date of the confirmatory resolution, and that *H. W. Pettis* should be appointed trustee in the matter to receive and distribute the composition. *Powers & Son* were present at this meeting, but they did not assent to the resolutions. At the second meeting of the creditors, on the 1st of January, 1883, the

(1) 5 C. P. D. 354.

resolutions were confirmed, and they were registered on the 3rd of January. The first instalment of the composition became due on the 1st of February, 1883, and before that day the debtor paid to the trustee the amount necessary to pay that instalment, and the trustee on the 2nd of February sent a circular letter to all the creditors, including *Powers & Son*, informing them that the first instalment of the composition would be payable at his office on the 9th of February. *Powers & Son* declined to receive the composition, and on the 8th of February they commenced an action against *Engelhardt* in the Mayor's Court of the City of *London* for the £17 15*s*. This was the first intimation which he had received that the debt due to them exceeded £17. On the 7th of March he served on *Powers & Son* notice of a motion in the *London* Bankruptcy Court on the 8th of March for an order restraining them from proceeding further in their action. On the 8th of March the Registrar refused the application, on the ground that, under sect. 126 of the *Bankruptcy Act*, 1869, *Powers & Son* were not bound by the resolutions, because the amount of their debt had not been accurately set forth in the debtor's statement of affairs. The debtor appealed.

Winslow, Q.C., and *T. Lee Roberts*, for the Appellant:—

The inadvertent omission of 15*s*. is not sufficient to prevent *Powers & Son* from being bound by the resolutions. Could it have been intended by sect. 126 (1) that such a result should

(1) Sect. 126 provides (*inter alia*) that "the provisions of a composition accepted by an extraordinary resolution in pursuance of this section shall be binding on all the creditors whose names and addresses, and the amount of the debts due to whom, are shown in the statement of the debtor, produced to the meetings at which the resolution has passed, but shall not affect or prejudice the rights of any other creditors."

And also that "any mistake made inadvertently by a debtor in the statement of his debts may be corrected after the prescribed notice has been given, with the consent of a general meeting of his creditors."

Rule 304. "General meetings subsequent to the appointment of a trustee shall be summoned by him by giving seven days' notice by post to each of the creditors who have proved their debts, stating the object of the meeting and the business proposed to be transacted thereat."

Rule 306. "Any mistake made inadvertently by a debtor in the statement of his debts may be corrected with the assent of a majority in value of his creditors assembled at a general meeting similarly summoned by the debtor."

C. A. 1883 *Ex parte* ENGELHARDT. *In re* ENGELHARDT.

follow in every case in which a debtor does not know to a few shillings the amount due to any creditor? Here *Powers & Son* attended the meeting and saw the statement of affairs, and they did not call the debtor's attention to the error.

[BAGGALLAY, L.J., referred to *Wilson* v. *Breslauer* (1).]

The Registrar professed to follow *Burliner* v. *Royle* (2), but in that case Mr. Justice *Lopes* did not rightly apply the principle of *Wilson* v. *Breslauer* and *Ex parte Lang* (3).

[FRY, L.J.:—The debtor seems to have inserted this debt in his statement without asking the creditors what they were going to charge him for the goods.]

Liquidation petitions are always filed in a hurry; if the debtor is to wait for the purpose of asking some of his creditors the exact amount of their debts, other creditors may come in and sweep away all his assets. If a creditor declines to tell him the amount of his debt, what is the debtor to do? A substantial compliance with sect. 126 is all that is required: *Ex parte Jerningham* (4). It would be unjust if by reason of a trivial clerical error one creditor was allowed to obtain 20*s.* in the pound. The Court can relieve from the effect of an accidental mistake: *In re Hatton* (5). The action is vexatious: *Ex parte Lopez* (6). At any rate the proceedings in the action should be restrained until the debtor can summon a general meeting of his creditors under rule 306 and obtain their assent to a correction of the error in the statement of affairs.

[BAGGALLAY, L.J.:—In *Ex parte Mathewes* (7) the Court of Appeal held that it was too late to make such an application after the creditor had commenced his action.]

Such a construction would render the provision for the correction of error nugatory. Here the debtor did not know of the error until the writ was issued, and that would often be the case.

[BAGGALLAY, L.J.:—You did not make this application to the

(1) 2 C. P. D. 314; 3 App. Cas. 672.
(2) 5 C. P. D. 354.
(3) 5 Ch. D. 971.
(4) 9 Ch. D. 466.
(5) Law Rep. 7 Ch. 723.
(6) 5 Ch. D. 65.
(7) Law Rep. 10 Ch. 304.

Registrar, and it is now four months since you first knew of the error.]

The error does not affect the other creditors; it is a matter between the debtor and these particular creditors only.

Robinson, Q.C., and *Wyatt Hart*, for *Powers & Son*, were not heard.

BAGGALLAY, L.J.:—

It has been strongly urged that we ought not to base our decision on *Burliner* v. *Royle* (1), which, it is said, was wrongly decided. I cannot take that view; it seems to me that that case was perfectly rightly decided, and I entirely agree in the decision. But I found my judgment upon much earlier authorities, upon which *Burliner* v. *Royle* itself was decided. The ground of the present application is this, that having regard to the provisions of sect. 126, the debt due to *Powers & Son* was in substance sufficiently stated so as to bind them by the resolutions and to preclude them from bringing an action against the debtor for their debt. No doubt there was an inaccuracy in the statement of the debt, and one cannot, at first sight, help thinking that so slight an inaccuracy ought not to prevent the resolutions from binding these particular creditors. But it does not appear to be such a hardship on the debtors that these creditors should not be bound by the resolutions when it is remembered that the mistake could have been corrected if the proper steps had been taken to do so. *Ex parte Mathewes* (2) shews how essential it is that in all these cases there should be the most perfect and complete accuracy, not only as regards the names and addresses of the creditors, but also in the statement of the amounts due to them, and also that if there is any inaccuracy, the debtor should apply at the earliest possible time to have it corrected. The mode of doing this is pointed out by rule 306, and if it was for the benefit of the creditors, they would, no doubt, assent to the correction being made. In *Ex parte Mathewes* the debtor made such an application three months after a creditor had commenced an action against him, and the Court of Appeal held that

(1) 5 C. P. D. 354. (2) Law Rep. 10 Ch. 304.

C. A. 1883 *Ex parte* ENGELHARDT. *In re* ENGELHARDT. Baggallay, L.J.

the application was made too late. I do not understand that decision to mean that in no case could the application be made after an action had been commenced by the creditor whose debt had been mis-stated; but that, having regard to the time when the debtor had notice of the error, the application was too late. In the present case there would be great difficulty in allowing the debtor to have an opportunity of correcting the error, four months having elapsed since he must have known of it. The concluding observations of *Mellish*, L.J., in *Ex parte Mathewes* (1) have a strong bearing on this. He said: "The debtor has not summoned a meeting, and it is too late for the Court to allow him to have it called now. . . . The action was commenced on the 5th of November, and up to this time (19th of February no steps have been taken to correct the mistake. There is no section in the Act that deprives *Mathewes* of his rights, and he is therefore entitled to pursue his ordinary remedies as a creditor." The same view as to the strictness with which the requirements of the Act must be followed was adopted by *Lopes*, J., in *Burliner* v. *Royle* (2), and that case is important with regard to the point which has been so much pressed on us here, that the error is a very trifling one. But where are you to draw the line? Is it to be drawn at 15*s.* or at 20*s.*? It is of the very essence of the Act that if advantage is to be taken of its provisions there must be a most strict obedience to its requirements, and if the debtor wants to have a mistake corrected he must take the necessary steps promptly. In *Burliner* v. *Royle* the amount of the error was 20*s.*; in the present case it is only 15*s.*, but it is much larger in proportion to the amount of the debt than in *Burliner* v. *Royle*. It has crossed my mind whether we might not allow this appeal to stand over to give the debtor an opportunity of summoning a general meeting of his creditors. But, having regard to *Ex parte Mathewes*, and to the general current of authority, I think we should not be justified in so doing, though the error is a trifling one. I think the injunction ought not to be granted.

LINDLEY, L.J.:—

I do not see my way to take any other view of the case. Of

(1) Law Rep. 10 Ch. 307. (2) 5 C. P. D. 354.

course the inclination of the Court would be to allow a mistake to be corrected, but when we see what has taken place in this case, I do not think we ought to interfere. Are *Powers & Son* bound by the resolutions? They have done nothing, there is no personal equity against them. The facts are not such that we can say they have precluded themselves from standing on their strict rights. What are their rights? The Act says that the composition resolutions shall not bind any creditor the amount of whose debt is not stated in the debtor's statement of his affairs, and at the same time you are told how a mistake made inadvertently may be corrected. The debtor has not had recourse to that method, and the only matter worth considering is whether we ought now to stay the proceedings in the action to enable him to obtain the assent of his creditors to a correction of the mistake. I should have thought there was a strong case for doing this if it did not appear that no one thought of making the application before now. The application being now made for the first time, I think it is too late. In strict law, the decision of the Registrar is right, and there has been no conduct on the part of *Powers & Son* which can preclude them from insisting on their strict rights, and, after the time which has elapsed since the debtor became aware of the mistake, it would not be right to give him an opportunity of correcting it.

FRY, L.J.:—

The first question is whether *Powers & Son* are bound by the resolutions, and the language of the Act is very explicit. It is, in the first place, affirmative, defining what creditors shall be bound by the resolutions, and, in the next place, it is negative, declaring that no others shall be bound. Are *Powers & Son* creditors who come within the negative words? It is conceded that in strictness they are. I feel bound to come to the conclusion that the clause must be strictly construed, and this for several reasons. First, by reason of the negative words, the effect of which is that you are not to take away from any creditor his common law rights, unless he comes within the previous definition of creditors who are to be bound. In the next place, the provision which is made for the correction of mistakes is a reason

C. A. 1883 *Ex parte* ENGELHARDT. *In re* ENGELHARDT. Fry, L.J.

for holding the debtor strictly to the conditions imposed by the statute. In the third place, there is a long series of decisions that the requirements of the Act must be strictly complied with, or the debtor cannot avail himself of its provisions. It is sufficient to refer to *Ex parte Lang* (1), *Wilson* v. *Breslauer* (2), and *Burliner* v. *Royle* (3). The result is that the debtor cannot, as matters now stand, avail himself of the resolutions as against these creditors. The next inquiry is whether there is any personal equity against these creditors, and I think there is none. The only other inquiry is whether the proceedings in the action ought to be stayed until the debtor has had an opportunity of summoning a general meeting of his creditors. Having regard to the strong negative words in sect. 126, to which I have referred, I am not convinced that the Court would have any right to grant an injunction for such a purpose. But it is not necessary to decide that point, for no such application was made to the Registrar, and I think it is too late to make it now.

Solicitor for debtor: *H. Aird.*
Solicitors for creditors: *Hatchett Jones & Letcher.*

W. L. C.

C. A. 1882 KAY, J. *Nov.* 23, 24. C. A. 1883 *June* 19, 23.

KING *v.* LUCAS.

[1881 K. 82.]

Husband and Wife—Wife's Contract—Charge on Separate Estate—Trust for Separate Use not arising till after Contract—Policies on Life of Husband.

By a post-nuptial settlement made in pursuance of ante-nuptial articles, certain policies of insurance on the life of the husband were assigned to trustees upon trust to receive the money and pay the income to the wife during her life for her separate use, independently of any future husband whom she might marry. There was no restraint on anticipation. During the life of her first husband the wife made promissory notes in favour of the Plaintiff, and the Plaintiff, the first husband being still alive, brought an action claiming a charge on the policies:—

Held (reversing the decision of *Kay*, J.), that the trust for separate use

(1) 5 Ch. D. 971. (2) 2 C. P. D. 314.
(3) 5 C. P. D. 354.

did not arise till after the death of the husband, and that as the contracts of a married woman can only be enforced against property which formed part of her separate estate at the date of the contract, the action could not be maintained.

In re Gaffee (1), *In re Molyneux' Estate* (2), and *Sturgis* v. *Corp* (3), discussed.

BY a settlement dated the 21st of December, 1850, and made between the Defendant, *Samuel L. L. Lucas*, of the first part, the Defendant, *Mary Yelverton L. Lucas*, his wife, of the second part, and three trustees, of whom the Defendant *A. Eden* was the survivor, of the third part, in pursuance of articles made before the marriage of Mr. and Mrs. *Lucas* five policies of insurance on the life of the said *Samuel L. L. Lucas* were assigned to the trustees upon trust that they should after the death of *Samuel L. L. Lucas* receive and enforce payment of the several sums secured thereby, and should invest the same with the consent of *Mary Yelverton L. Lucas* during her life, and should pay the annual income of the trust funds or permit the same to be received by *Mary Yelverton L. Lucas* during her life for her sole and separate use, and so that the same should not be subject to the debts, control, interference, or engagements of any future husband with whom she might intermarry, and after the death of the survivor of *Samuel L. L. Lucas* and *Mary Yelverton L. Lucas* should hold the said trust funds in trust for the issue of the marriage as therein mentioned, with an ultimate remainder in trust for *Samuel L. L. Lucas* absolutely.

In 1875 and 1876 Mrs. *Lucas* borrowed certain sums of money from the Plaintiff, and drew two promissory notes for £1300 and £750 in favour of the Plaintiff. These notes not having been paid, the Plaintiff brought an action against Mrs. *Lucas*, her husband and the trustee being also made Defendants, to have it declared that the separate estate of Mrs. *Lucas* under the indenture of settlement was chargeable with what was due to the Plaintiff on the promissory notes.

Mrs. *Lucas* was entitled to no other separate estate except that

(1) 1 Mac. & G. 541. (2) I. R. 6 Eq. 411.
(3) 13 Ves. 190.

C. A. 1883 KING v. LUCAS.

which was comprised in the indenture of settlement; and the sole question in the action was whether the Plaintiff was entitled to a charge on the policies of insurance thereby settled.

The action came on for hearing before Mr. Justice *Kay* on the 23rd of November, 1882.

Hastings, Q.C., and *A. B. Pearson*, for the Plaintiff:—

The Defendant Mrs. *Lucas* has an interest under the deed of the 21st of December, 1850, and it was settled upon her for her sole and separate use. An interest so given to a married woman for her separate estate the Court will not cut down by the subsequent words.

[KAY, J., referred to *Johnson* v. *Gallagher* (1).]

The separate use is intended to confer a power of disposition on the wife, and that can be effected unless there are words of restraint, which must be clear, distinct, and express, added, and they are not to be found in this deed. The authorities shew that notwithstanding the words creating the separate estate may refer to a particular coverture, the power of disposition will exist during the whole of the wife's life: *In re Molyneux' Estate* (2). There a jointure was limited to the sole and separate use, and it was held to apply to the then and every future coverture. The Plaintiff is entitled to say, looking at the authorities, that where there is in a settlement a limitation to a wife for her sole and separate use, the proposition to limit it either to the present coverture or a future must be rejected. It may be argued that the interest is contingent, as it cannot arise until after the husband's death, but it is submitted that the interest is vested though the enjoyment is postponed till after the death, and it is not less an immediate interest settled to the separate use because it points to the future.

[They referred to the cases of *Steedman* v. *Poole* (3); *Hawkes* v. *Hubback* (4); *In re Gaffee* (5); *Sturgis* v. *Corp* (6).]

(1) 3 D. F. & J. 494.
(2) I. R. 6 Eq. 411.
(3) 6 Hare, 193.
(4) Law Rep. 11 Eq. 5.
(5) 1 Mac. & G. 541.
(6) 13 Ves. 190.

C. A. 1883 KING v. LUCAS.

W. Pearson, Q.C., and *Russell Roberts*, for Mrs. *Lucas* and her trustee :—

It must be assumed that the promissory notes were given in respect of the separate estate. The only question is the construction of the deed of 1850. The wife's interest in the proceeds of the policies cannot come into possession during the existing coverture. After her husband, Mr. *Lucas's*, death she will have an interest in the income as a *feme sole*. It is well settled that a married woman can only dispose of that separate estate which she has at the time of entering into the contract—she cannot dispose of that which she has not: *Pike* v. *Fitzgibbon* (1); *Martin* v. *Fitzgibbon* (2); *Flower* v. *Buller* (3).

The cases which have been cited for the Plaintiff do not apply here, as, with the exception of *In re Molyneux' Estate* (4), which was a jointure disposed of by a deed acknowledged, they were cases in which there was a restraint against anticipation, and there is none here; but the wife's position is peculiar, as her interest cannot come into existence until she is discovert. The interest is not contingent, but one which can never come to her as a married woman. It is a reversionary interest and cannot be affected by any disposition which she may attempt to make during the present husband's life; and the deed expressly points at a future coverture.

They also referred to *Mara* v. *Manning* (5), and *Bestall* v. *Bunbury* (6).

KAY, J. :—

I do not think, Mr. *Hastings*, I need call upon you to reply. I have had an interval during which I have considered this case, and the difficulties which I suggested to counsel for the Defendants have not been removed by their arguments.

This question arises upon the deed of December, 1850, by which certain policies of insurance effected upon the life of *Samuel Lucas*, one of the parties to the deed and the husband of

(1) 14 Ch. D. 837; 17 Ch. D. 454.
(2) 17 Ch. D. 454.
(3) 15 Ch. D. 665.
(4) I. R. 6 Eq. 411.
(5) 2 J. & Lat. 311; 8 Ir. Eq. Rep. 218.
(6) 13 Ir. Ch. Rep. 318, 549.

C. A. 1883 KING v. LUCAS. Kay, J.

Mary Yelverton Lucas, who was also a party to the deed, were settled upon trust for the trustees to receive the moneys which should by virtue of the policies of insurance become payable upon the death of the husband, and to stand possessed thereof upon trust, with the consent of the wife during her life, and after her death at their discretion, to invest the same; and the deed contained these words, "and do and shall pay the interest, dividends, and annual proceeds of the said trust moneys, stocks, funds, and securities unto or permit the same to be received by the said *Mary Yelverton Lucas* during her life for her sole and separate use, and so that the same shall not be subject to the debts, control, interference, or engagements of any future husband with whom the said *Mary Yelverton Lucas* may intermarry."

Here we have words which in the first place give Mrs. *Lucas* an interest for her separate use during her life, to pay the proceeds or permit the same to be received by her during her life for her sole and separate use, but the words which follow are, "and so that the same shall not be subject to the debts, control, interference, or engagements of any future husband," as though the separate use was intended only to arise after the death of her first husband, and there was to be no separate use during the life of her first husband. Of course I must have regard to this circumstance. It is a life interest, which would commence after the death of her present husband, I mean commence in possession, and which by no possibility can commence in possession during the lifetime of her present husband. Moreover, it is a life interest in personal property, which does not come within Sir *Richard Malins' Act*, and therefore unless it be separate estate can by no means be disposed of by Mrs. *Lucas* during the life of her present husband. Now what is the object of limiting personal property, or any property, to a married woman for her sole and separate use. The object, as it seems to me, is twofold; to give her a power of disposition of the property; and to protect her against her husband and make it her property as between her and her husband. Those are the two objects. I cannot say that one of them is of more importance than the other. It was known very long before this settlement was made that if the object were solely to protect a married woman against her husband, and not to allow

her a power of disposition, there was a mode of doing it, namely, by limiting the property not only to her separate use, but with a restraint on anticipation. Here the restraint on anticipation is wanting, there is no such thing, therefore I must take it that the settlor had the double object in view of protecting Mrs. *Lucas* against her present husband, or the future husband whoever he might be, and of giving her a power of disposition, and that designedly he did not mean to prevent her disposing of the property, but to enable her to dispose of it; that being one at least of the objects of this provision; but I should have found considerable difficulty in determining this question if it had not been that, as it seems to me, I am bound by authorities from which I cannot on any fair principle of construction distinguish this case. The cases which have been cited I will now refer to. First there is the case of *Steedman* v. *Poole* (1). The bequest there was of leasehold property to *Mary Ann Steedman* the wife of *Thomas Steedman*, recognising that she was a married woman at the time the bequest was made, and was in these words, "for her whole and sole use during her natural life free from the control of any future husband, and not to be sold or mortgaged." It was held that the limitation to her separate use coupled with the restraint upon anticipation applied to her existing marriage, and was not confined to a future marriage, although the words were, "for her whole and sole use during her natural life free from the control of any future husband." That is to say, where in the first words there is a limitation to separate use, and afterwards words which seem to restrict that limitation to a future coverture, the generality of the first words is not held to be controlled by the subsequent words, but if the purpose applies to the existing marriage, as well as to a future marriage, the first words which give her a separate estate are held to be the governing words, and accordingly it was held that the separate estate with a restraint on anticipation applied to the existing marriage as well as to any future marriage. Now in that case the object was (there being a restraint on anticipation) to protect the wife against the husband only, and that protection would not have been completely given if the existing

(1) 6 Hare, 193.

C. A. 1883 KING v. LUCAS. Kay, J.

husband had had a power of alienation, the property being leasehold. But in this case the object was not to protect against the husband merely, but to give a power of disposition, and that object will not be completely fulfilled unless I hold the words giving her an estate for her separate use to apply not merely to a future marriage, but also to the existing marriage, because otherwise she will have no power whatever of disposing of the property during the existing marriage. The next case is that of *In re Gaffee* (1), and the limitation set forth on p. 543, by a post-nuptial settlement, was of a sum of money, the property of the wife, to pay the dividends to the wife, or "to such persons as she should by writing under her hand appoint, but so as not to dispose of the same by sale, mortgage, or otherwise in the way of anticipation, in default of that appointment into her own hands for her separate use, notwithstanding her coverture, independent of the said *Benjamin Gaffee*, who is not to intermeddle," &c. Of course the argument was that it was restricted to the existing coverture, and that the separate use and restraint on anticipation did not apply to future coverture. It was held that it did, that the subsequent words "independent of *Benjamin Gaffee*" did not restrain the generality of the former words, the purpose being there to restrain her altogether from anticipation, and accordingly the former words, which would seem to apply to any marriage unless they had been controlled by the subsequent words, were held to be the governing words.

Then there is a case, *In re Molyneux' Estate* (2), which seems to me to be almost undistinguishable from the present. I will point out presently the only possible distinction. By a settlement a jointure was granted to the wife, which, of course, could only come into existence after the death of her existing husband, and the terms in which it was granted are given in the judgment thus:—"and from and after the death of the said *Henry Hearn Molyneux*, in case the said *Agnes* shall survive him, to pay to the said *Agnes*, her assigns, for and during her natural life, and without power of anticipation, the yearly rent-charge of £300." I observe that the distinction, and the only distinction so far as I can see, between that case and this is, that it does not say so

(1) 1 Mac. & G. 541. (2) I. R. 6 Eq. 411.

that the same shall not be subject to the debts, control or interference of any future husband, there is no reference to that, it is simply for her natural life without power of anticipation. Now what happened was this. By an acknowledged deed in the lifetime of *Henry Hearn Molyneux* the estate was disposed of freed from this jointure, and if the limitation were not a limitation to her separate use without power of anticipation, which applied to that marriage, the deed would have been good and binding upon her. The question, therefore was whether the trust for her separate use with a restraint on anticipation applied to the existing marriage, and upon the authority of cases which I have mentioned it was held that it did, and therefore the deed was inoperative in Equity. The words used by the Judge are these (1), "*In re Gaffee* (2) and *Hawkes* v. *Hubback* (3) show that where the words used are sufficient in themselves to create a separate estate with a restraint upon alienation, and where in a subsequent part of the clause there are other words which would appear intended to restrict the operation of the clause to the marriage then in contemplation, such words, unless such intention is expressly declared, are merely superfluous, and have not the effect of limiting the estate to the life of the intended husband." That proposition is the converse of the present case, but the reasoning appears to me to be identical. The learned Judge did not refer to the case which I first referred to of *Steedman* v. *Poole* (4), where the words were in terms by the subsequent part of the clause restricted to a future coverture, and it was held that the restriction must be disregarded, and the first must be the governing words. But the case of *In re Molyneux' Estate* (5) is important in reference to the case before me for this particular reason:—The words by which the jointure was limited were these: "And from and after the death of the said *Henry Hearn Molyneux*, in case the said *Agnes* shall survive him, to pay to the said *Agnes* and her assigns for and during her life, and without power of anticipation, the yearly rent-charge of £300," so that the only words which amounted to a trust for her separate use without

(1) I. R. 6 Eq. 416.
(2) 1 Mac. & G. 541.
(3) Law Rep. 11 Eq. 5.
(4) 6 Hare, 193.
(5) I. R. 6 Eq. 411.

C. A. 1883 KING v. LUCAS Kay, J.

power of anticipation were the words which directed the payment of this to her after the death of her husband. In that respect this case is absolutely identical, because here the words are, "shall pay the income or permit the same to be received by the said *Mary Yelverton Lucas* during her life for her sole and separate use," so that the Irish case is a decision that a direction to pay an income, which cannot by any means come into possession until after the determination of the existing coverture, to a married woman for her separate use is sufficient to make that separate use apply to the existing coverture as well as to the future coverture, if the nature of the limitation requires for her protection or for her benefit that it should so apply. Accordingly as matter of construction the Irish Court decided that words like those which I have here, to pay to her the income of the fund, which income could only arise after the death of her husband, during her life for her separate use, are words which, if the nature of the limitation requires it, are sufficient to give her the separate use during the life of the existing husband. There is another case, which I should have mentioned before the case of *In re Molyneux' Estate* (1), viz., that of *Hawkes* v. *Hubback* (2). There by a marriage settlement the income of a fund was limited thus, during the life of the wife to pay the income to the said wife for her separate use independent of the debts and control of her said intended husband, and it was held that that applied to a future coverture just as much as to an existing coverture. Accordingly I have got a series of authorities which seem to me to establish the proposition, which I will state shortly thus:—A direction to pay an income which does not arise until after the death of an existing husband to the wife for her life for her separate use, entitles her to be treated as having an interest in that income for her separate use during the existing coverture, if the nature of the case requires it.

I now go back to what I said at first: "What is the object of giving a married woman an interest for her separate use." One object, and the chief object I take it, is to enable her to dispose of it. If I held that the separate use here did not apply to the existing coverture, she could not dispose of the property

(1) I. R. 6 Eq. 411. (2) Law Rep. 11 Eq. 5.

C. A. 1883 KING v. LUCAS. Kay, J.

during the existing coverture. If it had been intended to prevent her disposing of it, the limitation would have gone on to say "without power of anticipation." Therefore, it was not intended to prevent her disposing of it. Accordingly I feel myself bound by the cases I have referred to, to hold that the first words which created a trust for her separate use during her life must be the governing words, and that they are not restricted by the subsequent words which seem to apply to future coverture only, and that accordingly she had during the life of her existing husband a power of disposition in Equity over the life interest in her; which was a vested life interest, in no sense contingent, from the date of the settlement. It has not been argued that if a married woman has a vested life interest for her separate use her promissory note will not be a charge upon it. That has been decided in many cases. An authority has been referred to, where Lord *St. Leonards* refused to apply that to a contingent reversionary interest, on what principle I confess I do not at present quite understand, but, however, I have not got to deal with that point here. This is a vested reversionary interest. Therefore I hold that the promissory notes of Mrs. *Lucas* effected a charge in Equity on her life interest.

T. F. M.

C. A.

From this judgment Mrs. *Lucas* appealed. The appeal came on for hearing on the 19th of June, 1883.

W. Pearson, Q.C., and *Russell Roberts*, for the Appellant:—

We contend that during her present coverture Mrs. *Lucas* has no interest under the settlement which she can in any way affect. There is no gift to her except in a direction to pay to her after her present husband's death. The object of the settlement was to provide her with maintenance during her widowhood, but the effect of the decision is to enable her to anticipate it in order to pay her husband's debts. The cases relied on by Mr. Justice *Kay* do not support his decision. *Steedman* v. *Poole* (1) lays down no principle which can be a guide in any other case; it was a decision on the terms of a specially worded instrument which was held to give an immediate interest. *In re Gaffee* (2) and *In re*

(1) 6 Hare, 193. (2) 1 Mac. & G. 541.

C. A. 1883 KING v. LUCAS.

Molyneux' Estate (1) have really no bearing on the case. *Hawkes* v. *Hubback* (2) only decided that a general trust for a married woman's separate use with a restraint on anticipation was not on the construction of the instrument there in question cut down to a particular coverture. *Moore* v. *Morris* (3) is a case where it was held to be confined to a particular coverture. The present case is on all fours with *Mara* v. *Manning* (4). There, if the husband took the benefit of the *Insolvent Acts* the income was to go over from the husband to the wife for life for her separate use. At her solicitation the trustee lent the fund to the husband and it was lost. The trustee having replaced it claimed to attach her life interest, but it was held that when she made the request she had not any interest which she could bind. This decision was approved in *Bestall* v. *Bunbury* (5), and the same principle applies to the present case. A married woman cannot bar her right by survivorship to a reversionary interest not settled to her separate use. Here unless Mrs. *Lucas* survives she takes nothing. If she does survive she takes an interest which is not separate estate until she marries again. Even if it is separate estate at all, it is separate estate which she has not now got, and is not affected by her general engagements: *Pike* v. *Fitzgibbon* (6). Mr. Justice *Kay*, as we contend, did not sufficiently have regard to the terms of this settlement, but applied his mind to the reported cases relating to settlements in which there were inconsistencies with which the Court had to deal as it best could. Here we say the settlement is clear. Again, if this is property with which Mrs. *Lucas* can deal she can alienate it, and as it cannot be now laid hold of, a judgment against it for her general engagements would be futile, for general engagements do not prevent alienations, as is laid down in *Pike* v. *Fitzgibbon*, and the Court will not make an order which, if made, would be a nullity.

Hastings, Q.C., and *A. B. Pearson*, for the Plaintiff:—

If this is separate estate the Plaintiff is entitled to judgment and execution. The policies are not mere possibilities; they are *debita in præsenti, solvenda in futuro.*

(1) I. R. 6 Eq. 411.
(2) Law Rep. 11 Eq. 5.
(3) 4 Drew. 33.
(4) 2 J. & Lat. 311.
(5) 13 Ir. Ch. Rep. 318, 549.
(6) 17 Ch. D. 454.

[BAGGALLAY, L.J.:—Suppose funds settled in trust for the husband for life, and after his death to the wife for life for her separate use, is that a case of separate use during the present coverture ?]

Yes; there may be present separate use in contingent reversionary property: *Lechmere* v. *Brotheridge* (1). The reference to the present coverture is left out merely because the present husband could by no possibility interfere. Separate use has never been considered to depend in any degree on the nature of the property.

[COTTON, L.J.:—No doubt a reversionary interest may be settled to a married woman's separate use. The question is whether, on the true construction of this settlement, it was intended thereby to give her any separate estate till after the death of her present husband.]

The gift is to her separate use during her life, which *primâ facie* means during her whole life; the burden lies on those who assert the contrary. The interest of Mrs. *Lucas*, it is true, cannot come into possession till a future time; but the nature of her interest must be decided from the words in which it is given—separate use for her life. The case of a mere possibility would be different, but if she has an interest that interest is affected by the trust for separate use. The words referring to a future coverture are surplusage, but it would have been more manifest surplusage to extend them to the present coverture, and purport to exclude the husband from an interest with which he could not by any possibility interfere. In the cases which have been referred to words of this kind were held not to exclude the present coverture when there was in the first place a trust for the wife's separate use generally. The case of *In re Molyneux' Estate* (2) is, as Mr Justice *Kay* said, undistinguishable from the present, the whole argument having turned on the fact that the interest could not arise till after the determination of the coverture. In *Mara* v. *Manning* (3) the interest was contingent. At the time when that case was decided the rules as to separate estate were not so well

(1) 32 Beav. 353. (2) I. R. 6 Eq. 411.
(3) 2 J. & Lat. 311.

C. A. 1883 KING v. LUCAS.

defined as now, and it has been thought doubtful whether that case would be followed in *England*.

COTTON, L.J.:—

This case has been very fully and ably argued, but we are unable to agree with the conclusion at which Mr. Justice *Kay* arrived. The action is brought on the ground that a married woman contracted so as to give a claim against her separate estate. With respect to her separate estate she is treated as a *feme sole*, but it has been decided that it must be separate estate which belonged to her at the time of the making of the contract and is still remaining at the time when the contract is enforced and judgment obtained. In *Pike* v. *Fitzgibbon* (1) it was held by a learned Judge that all separate property could be charged which belonged to the married woman at the time when the contract was enforced, but that was held to be erroneous by the Court of Appeal, and the rule was laid down that the contract could be enforced only against the separate estate existing at the date of the contract.

In the present case, therefore, there is no question as to any principle; the only question is whether certain property was the separate property of the lady when she made the contract. The conclusion I have arrived at is, that having regard to the settlement the only property to which the trust for separate use was attached was to be acquired after the termination of the then existing coverture. The subject of the settlement was two policies of insurance on the husband's life. Therefore it was property which was not capable of producing any income to the lady till after her husband's death. The settlement directs that the trustees are to pay the income to the lady "during her life for her sole and separate use, and so that the same shall not be subject to the debts, control, interference, or engagements of any future husband." Now if we were to put this clause before any ordinary person capable of giving an opinion as to the construction of the settlement, there cannot be a doubt that he would say that it was intended that when the property settled began to produce an income, the trust for separate use was to arise, in other words, that

(1) 14 Ch. D. 837; 17 Ch. D. 454.

it was to arise on the death of her first husband, so that in case of her taking a future husband he was to have no control over the income. I think that is the true construction. The trust to pay the income to her only came into existence after the death of her present husband, and during the time when the income was paid to her it was to be for her separate use. Therefore I am of opinion on the true construction of the settlement that the Plaintiff had no right of action against this lady.

I have said that the case depends only on the construction of the settlement, and where the question turns on the construction of an instrument decided cases do not give much assistance, because no two instruments are exactly the same. Of course if any general rule is laid down we are bound by it, but even rules of construction cannot be followed if the words of the instrument shew a contrary intention. I will, however, refer to two of the authorities cited. In the case of *In re Gaffee* (1) the trustees were directed to pay the income to the wife or her appointees during her life for her separate use without power of anticipation, independent of *B. Gaffee*, her present husband; and the question was whether the restraint on anticipation referred to a future coverture. That case, in my opinion, lays down no rule applicable to the present case. There was a trust for separate use, not limited in duration, with a special reference to the present husband, and it was held that it did not prevent the trust from applying to a future coverture. Then, in *Sturgis* v. *Corp* (2) certain property was settled upon trust for *Ann Sturgis* during her life, and after her death in trust for *Martha Sturgis* for her separate use, and it was held that *Martha Sturgis* could dispose of her reversionary interest during the life of *Ann Sturgis*. In that case there was existing property settled with reference to an existing coverture; and the Court arrived at the conclusion that the lady could dispose of her interest even though she was not in actual enjoyment of the property. But when I look at the words of the settlement in the case before us, I am of opinion that the trust for separate use applies to a future coverture only. I think, therefore, that the decision of Mr. Justice *Kay* must be reversed, and that on the true construction of

(1) 1 Mac. & G. 541. (2) 13 Ves. 190.

C. A. 1883 KING v. LUCAS.

the settlement the Plaintiff has no cause of action against the Defendant.

BAGGALLAY, L.J.:—

In my opinion, although this case is not identical with *Pike* v. *Fitzgibbon* (1) it is governed by the principles there laid down. The rules of the Court respecting the separate property of a married woman are clearly enunciated by Lord Justice *Turner* in *Johnson* v. *Gallagher* (2), and I need not repeat them.

I have nothing to add to what Lord Justice *Cotton* has said on the construction of the settlement in this case. I quite agree with him that the Plaintiff has no cause of action, and that the decision of Mr. Justice *Kay* must be reversed.

BOWEN, L.J.:—

I am of the same opinion. This case turns entirely on the construction of the settlement, and I feel no doubt that the true construction is that the trust for the lady is only to take effect after the death of her then present husband. *Sturgis* v. *Corp* (3) is, in my opinion, distinguishable from the present case.

Solicitor for Appellant: *H. K. Avory.*
Solicitor for Plaintiff: *R. J. Patten.*

(1) 17 Ch. D. 454. (2) 3 D. F. & J. 494.
(3) 13 Ves. 190.

M. W.

COOTE *v.* JUDD.

V.-C. B.

1883

Jan. 31; *Feb.* 1, 7.

[1881 C. 429.]

Copyright — Infringement — Registration — Pleading — Objections — Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *ss.* 13, 16, 24 [*Revised Ed. Statutes, vol. viii. pp.* 1156, 1157, 1159].

Registration of a copyright is bad, if the name entered as that of "the publisher" is not that of the first publisher.

Weldon v. *Dicks* (1) followed.

In an action for infringement of copyright, where objections to the registration are not delivered within the prescribed time, the action may nevertheless be dismissed if a defect in the registration is brought out from the Plaintiff's evidence.

TRIAL OF ACTION.

On the 6th of November, 1874, *Peter J. Rumney*, the agent for the sale of a patent manufactured substance called "Dr. *Ridge's* Food for Infants and Invalids," wrote to *George Shore*, who, with his brother *Thomas*, carried on a publishing business in partnership at *Woolwich*, as follows:—

"Write a comic song (set to a lively air) in praise of *Dr. Ridge's Food for Babies*, the same to be sung during the winter season of 1874 and 1875, for which we agreed (*sic*) to pay the sum of ten pounds, viz., £5 on production of song in public, balance at the termination of fifty performances.

"*Peter J. Rumney.*
"(Dr. *Ridge & Co.*")

The firm of *T. & G. Shore* accordingly employed to write the song a Mr. *Harry Hunter*, who employed to compose the melody a Mr. *Walter Redmond*, and *Redmond*, on the 23rd of December, 1874, gave to *Hunter* a receipt for £1 1*s.* for all rights in the melody. The song was called "*The Beautiful Baby, or Dr. Ridge's Food.*" It was sung for the stipulated number of times by a troupe of singers, called *The Mohawk Minstrels*, with which Mr. *Hunter* was connected, and the Messrs. *Shore* were paid £10 by *Rumney*.

(1) 10 Ch. D. 247.

V.-C. B.
1883
COOTE
v.
JUDD.

The arrangement between the *Shores* and *Hunter* was not clearly ascertained. As early as on the 29th of October, 1874, there was a letter from *Hunter* to *T. Shore*, saying "the price would be £5 5*s.*, and I would guarantee the song to be sung by the *Minstrels* 100 times." In a letter from the same to the same, the writer said, "I would be happy to publish it, if you would bear part of the expense, say by taking 100 copies at 1*s.* each." On the 28th of December *Hunter* in a letter to *T. Shore* said, "Let me know what you have decided to do about the publishing."

Hunter in his examination deposed that there was a bargain between himself and the *Shores* that he should publish the song, they to take (he believed) 1000 copies. In the course of December, 1874, the music was engraved on metal plates, and a frontispiece and illustration were drawn on stone in the usual way. This, *Hunter* said, was done by his order and at his expense. He asserted that he was the first publisher, and that the first publication was on the 26th of December, 1874.

G. Shore in examination said that a memorandum, dated the 23rd of November, 1874, of an agreement with *Hunter*, was signed by his brother; but it could not be found. He said it contained no mention of copyright; and that there was nothing about copyright in the correspondence with *Hunter*.

From the 1st of January, 1875, onwards, there were sales of the song by *H. Hunter* to the *Shores*; and from the 7th of January, onwards, repeated sales by the *Shores* to *Rumney*. In the months of January and February, 1875, large sales took place to various publishers. On the title of several batches of these prints were imprinted, by altering the engraving, the names of the several publishers to whom the sales were made. Amongst these publishers was one *J. A. Turner*, of 1A, *Leadenhall Street*. Another was *Edmund Chappell* of the firm of the Plaintiffs in this action. *Hunter*, in evidence, said it was very probable that he sold a lot of the songs to *Turner* before the 26th of December, 1874. Another purchaser was *Rumney*, who, as agent for the owners of Dr. *Ridge's* Food also advertised the song at his principals' expense.

In the early part of 1875 a verbal arrangement was come to between *Hunter* and the Plaintiffs, *Charles Coote* and *Edward*

Chappell, trading as music-sellers under the firm of *Hopwood & Crew*, at No. 42, *New Bond Street*, for the sale by him to them of all his interest in the song, which ended in the following agreement:—

"*London*, 15th June, 1875.

"Received of *Charles Coote*, jun., and *Edward Chappell* (carrying on business under the firm of *Hopwood & Crew*), one copy, value one shilling, for the absolute sale of all my copyright and interest, present and future, vested and contingent, together with the right of representation of and in the song entitled "*The Beautiful Baby*," words written by me, and music composed by *W. Redmond*, under condition of the payment to me of a royalty of threepence on each copy sold, the said *Charles Coote*, jun., and *Edward Chappell* being entitled to use the melody in any separate musical composition which they may publish free from any royalty or other consideration in respect of such use.

"*Harry Hunter*."

The stock in hand and the plates from which the song was printed had been handed over and used by the Plaintiffs, as publishers, some time before the date of the written agreement.

In January, 1881, the Plaintiffs discovered that the words and music of the song were being printed by the Defendants, *Judd & Co.*, who were a firm of printers at *St. Andrew's Hill, City*, by the direction of the co-Defendant *William Foote*, the manager in *England* of a troupe of singers called *Haverley's Minstrels*, in certain programmes which were used at the performances of these minstrels; but it was not alleged that the song itself was advertised to be, or ever was, sung by *Haverley's Minstrels*.

The writ in the action was issued by Messrs. *Coote* and *Chappell* on the 29th of January, 1881, against *Judd & Co.*, and against a Mr. *Foote*, manager of *Haverley's Minstrels*, claiming an injunction to restrain the Defendants, *Judd & Co.*, from infringing the Plaintiffs' copyright in the song, and from printing, publishing, or circulating without the permission of the Plaintiffs any pamphlet or book containing the words or music of the song; for an account of profits; for damages; and for delivery up to the Plaintiffs of all copies of the books or circulars of *Haverley's Minstrels*.

A statement of claim was delivered on the 30th of March,

V.-C. B. 1883 COOTE v. JUDD.

1881; and on 7th of July, 1881, the Defendants served *Rumney* with a notice under Order XVI. rule 18, claiming to be indemnified by *Rumney* against liability in respect of any infringement of the Plaintiffs' alleged copyright, on the ground that such infringement was effected by means of an advertisement inserted by his instructions, and of his warranty of his right to order and insert such advertisement; and giving him notice that if he wished to dispute the Plaintiffs' claim, he must cause an appearance to be entered, and so forth, in the ordinary form (1).

On the 11th of July, 1881, the Defendants delivered a statement of defence, in which they denied that prior to the 15th of June, 1875, the copyright was vested in *Harry Hunter*, and affirmed that it was vested in *Rumney*. They said also that the Defendant *Foote* acted only as a servant, and submitted that his principal and not he (if any one) ought to be sued by the Plaintiffs; also that the Defendants *Judd & Co.* were instructed by *Foote* to receive and print advertisements in the programmes; that the song in question was inserted as an advertisement, having been received as such in the ordinary way of business through *Sells*, the advertising agent of *Rumney*, and that the person properly responsible for inserting the song was *Rumney*, who ought to have been made a party. They also said that after the 14th of January, 1881, the Defendant *Foote* gave instructions that the song in question should be torn out of the programmes, and that they never had any intention of continuing the sale of the programmes after the commencement of the action.

In conformity with the above notice *Rumney* caused an appearance to be entered within eight days of service; and on the 12th of January, 1882, upon the application of the Defendants under rule 21 of Order XVII., that, *Rumney* having appeared to the notice served upon him, directions might be given as to the mode of having the questions in dispute in the action determined, and upon hearing the solicitors for the applicants, and for the Plaintiffs, and for *Rumney*, an order was made by the Chief Clerk that *Rumney* be at liberty to defend the action; and that the question of the claim of the Defendants to indemnity, pursuant to their notice, be tried in the action; and the Defendants

(1) Rules of Court, 1875, Appendix B. Form 1.

and *Rumney* were to be at liberty to adduce evidence and cross-examine witnesses.

Issue was joined on the 22nd of July, 1882; and notices were, on the 6th of September, served by the Plaintiffs' solicitors, for trial on the 2nd of November.

On the 16th of December, 1882, Defendants' solicitors gave Plaintiffs notice that at the trial they intended to rely on a number of objections, to the effect that the Plaintiffs were not the authors, not the first publishers, and not the proprietors of the copyright of the song; that *Hunter* was author of the words, and *Redmond* of the music; that the song was first published by *J. A. Turner*, on the 26th of December, 1874; and that *Rumney* was the proprietor of the copyright. On the same day *Rumney* gave notice of objections to the like effect, with the addition that in January and February, 1875, he, (*Rumney*), published the song in the form of an advertisement. On the 25th of January, 1883, *Rumney* gave notice of an additional objection that he was the owner or proprietor of the copyright, *Hunter* having by writing assigned the copyright to the *Shores* as trustee for him. On the 27th of January the Defendants gave the Plaintiffs notice of a further objection to the same effect as the last.

As part of the Plaintiffs' case a certified copy of the registry book of the *Stationers' Company* was put in evidence, from which it appeared that the entry was made on the 12th of January, 1881; the "title" of the book was entered as *The Beautiful Baby, or Dr. Ridge's Food*, written by *Harry Hunter;* under the "name of the publisher and place of publication" were given the names and firm of the Plaintiffs; the same names and firm were given as the "proprietors of the copyright;" and the "date of the first publication" was entered as the 26th of December, 1874.

Hemming, Q.C., and *T. De Courcy Atkins*, for the Plaintiffs:—

The Plaintiffs' title is clear. Sect. 16 of the *Copyright Act*, 1842 (5 & 6 Vict. c. 45), provides that in any action for infringement, the Defendant "on pleading thereto" shall give to the Plaintiff a notice in writing of any objections on which he means to rely on the trial, and that at the trial no other objection shall

V.-C. B. 1883 COOTE v. JUDD.

be allowed. Here no notice of objections was given until after issue had been joined and notice of trial served. How can notice of objections at this late date be a compliance with the statute as far as the Defendants are concerned? As to the third party, *Rumney*, he has never pleaded at all, and his appearance is only to the Defendants' notice, and not to the Plaintiff's action. The objections, therefore, are irregular, and cannot be entertained by the Court.

[BACON, V.C., having declined to decide whether the objections were admissible or not, the Plaintiff *Coote* was examined, and in cross-examination stated that the Plaintiffs were not the first publishers, but that *Hunter* was.]

Hemming, and *Atkins*:—The register does not require the Plaintiffs to state, nor have they ever asserted, that they were the first publishers. They claim as proprietors of copyright, by purchase from *Hunter*, and the present though not the first publishers of the song.

Horton Smith, Q.C., and *Bunting*, for the Defendants:—

The Plaintiffs cannot sue unless they register the name of the first publisher: *Weldon* v. *Dicks* (1); and it is admitted by the Plaintiffs, independently of *Hunter's* clear statement of the fact, that they were not the first publishers. For the same reason the date of the 26th of December, 1874, as the date of the first publication, is erroneous. The Plaintiff, therefore, is disentitled to to sue (sect. 24), because he has not caused an entry "pursuant to the Act" to be made in the book of registry.

Our contention as to the copyright is, that it is in *Rumney*. He alone had and has the right of advertising it. But whether or not, we are innocent printers of an advertisement published by *Rumney's* order, through an ordinary advertising agent. As to *Foote*, directly he had notice, he ceased to publish.

Tho 15th and 16th sections relate wholly to actions on the case under the old pleading. When suits in equity are referred to in the Act they are expressly named, as in sect. 24. There is nothing in the Act which says the objections may not be on a separate piece of paper, or which limits the time for giving notice

(1) 10 Ch. D. 247.

of objections. In the parallel case of the *Patent Law Amendment Act* (15 & 16 Vict. c. 83), the expression is totally different—"the Plaintiff shall deliver, with his declaration, particulars of the breaches complained of in the said action."

Hunter may have thought himself the owner of this copyright, but the real owner was the man who employed and paid *Hunter*, namely, *Rumney: Sweet* v. *Benning* (1).

In any event, the injunction is too wide; but assuming a decree against us, there is an implied warranty on the part of *Rumney; Adamson* v. *Jarvis* (2); *Betts* v. *Gibbins* (3); *Toplis* v. *Grane* (4); *Dugdale* v. *Lovering* (5); hence we are entitled to an indemnity. Either the Plaintiffs fail, or we have a right over.

Millar, Q.C., *Francis Turner*, and *Vernon R. Smith*, for *Rumney*:—

The Plaintiffs have no right to sue: *Weldon* v. *Dicks* (6); *Low* v. *Routledge* (7).

Upon the evidence we say that *Hunter* was the first publisher and original owner. But the documents prove that *Rumney*, by paying *Hunter*, became the owner. *Hunter* was employed and paid by *Rumney*. At least the copyright was so far in *Rumney*, that he retained the right of advertising.

The Defendants can have no right of indemnity over against us.

Hemming, in reply:—

The Plaintiffs allege that the Defendants were the means whereby many thousand copies of our song were circulated. The Defendants admit they printed great numbers. After that admission the Court will, in accordance with universal practice, grant an injunction, whether the Defendants are innocent or not. As between the two Defendants it may be that the printers are innocent. If so, their co-Defendant must indemnify them; but with that the Plaintiffs have nothing to do. As to *Rumney* he is not a Defendant, and there is no relief asked by us against him, nor any issue between us.

(1) 16 C. B. 459.
(2) 4 Bing. 66.
(3) 2 Ad. & E. 57.
(4) 5 Bing. N. C. 636.
(5) Law Rep. 10 C. P. 196.
(6) 10 Ch. D. 247.
(7) 33 L. J. (Ch.) 717.

V.-C. B. 1883 COOTE v. JUDD.

Rumney says he was the owner throughout the transactions with *Hunter*. Then how comes it that we find *Rumney* buying copies of *Hunter's* song from *Hunter* who had published it? As to *Shore*, no document transferring the copyright from *Hunter* to *Shore* has been produced. Then it is found that after the sale to the Plaintiffs *Rumney* goes on buying the song from them.

It is said our registration is imperfect. But if the objections are rejected, as they ought to be, the Court has no issue and no evidence before it as to whether the registration was defective or not. The only case on which the Defendants can rely is the *dictum* in *Weldon* v. *Dicks* (1), which is scarcely consistent with *Collette* v. *Goode* (2), and quite inconsistent with the statute. The statute does not in terms say (sect. 3) that the name and abode of the "first" publisher must be registered, only the name and abode of "the publisher," and the forms given in the schedule are exactly those which were used in our case.

BACON, V.C.:—

The leading facts of this case are extremely simple.

The Plaintiffs say they are the proprietors of a certain thing which is classed by the statute under the word "book," namely a sheet of music or song. Of the copyright in this they are the sole owners; and they claim copyright under a title which is given to them by the statute. They cannot have any other title, because the statute says that whatever a man's rights may be, he cannot make any legal claim with respect to them unless a certain condition has been complied with. That condition is that before commencing any action or suit he must have registered the book in respect of which he claims copyright at *Stationers' Hall*, pursuant to the Act of Parliament. Among other entries required to be made in the registry book are those of "the time of the first publication" and "the name and place of abode of the publisher," and whether or not decided, it has been recognised as a principle of law, that by the word "publisher" is meant the person who first published the work in question.

In this case the date of registration is entered as of the 12th of January, 1881. The title of the book is entered; and then under

(1) 10 Ch. D. 247. (2) 7 Ch. D. 842.

the "name of publisher" and "place of publication" are entered the names of "*Charles Coote* and *Edward Chappell*, trading as *Hopwood & Crew*, 42, *New Bond Street, London*." Then under the head of "name and place of abode of the proprietor of the copyright," the same names are repeated; and the date of first publication is given as the 26th of December, 1874. In my opinion the statute requires something more than registration of the name of the person who happens to be the publisher at the date of the registration—it requires that the name of the person who first published the book should appear—and for this best of reasons, in order that everybody connected with the registration may ascertain for himself how far the right of a person claiming from or under the first publisher may be successfully challenged. And if, as I find to be the case here, the name of the first publisher is not on the registry book, then I think a plaintiff claiming to be the owner of the copyright in the book is not entitled to sue.

The Plaintiffs, therefore, in this case, not having, in my opinion, complied with the provisions of the statute, have no title to institute the action, and must submit to a decree of non-suit against them.

Another question in the suit is, whether the Defendants have succeeded in an attempt to set up the title of one *Peter Rumney* to the copyright in this song. It appears that he, being the agent of the owner of a nostrum of some kind, called a patent food, applies to a publisher to write a comic song in praise of the article which he sells. The publisher selects Mr. *Hunter*, a gentleman who if not in the habit of writing songs, is certainly capable of writing them, and Mr. *Hunter* writes the song and provides the music, for which he says the price will be £5 5*s*., and he undertakes to get the song sung 100 times. Mr. *Hunter* remains the sole owner of the copyright, and from that time until he parted with it no one can dispute his right to the ownership. He gets the song engraved, he keeps the metal plates and lithographic stone, he is the first publisher of the song, and so he remains until he sells to the present Plaintiffs for the consideration which has been stated. Then the Plaintiffs, becoming the owners of this property, bethink themselves of establishing their

V.-C. B. 1883 COOTE v. JUDD.

statutory right to it; and in January, 1881, they go to *Stationers' Hall*, and there they describe themselves, not only as the proprietors of the copyright, but as the publishers of the song, and they give the 26th of December, 1874, as the date of the first publication. But I have no doubt that in December, 1874, they had no more to do with the song than I have. So that, although the copyright is plainly vested in them, they have not done that which entitles them to sue. And then comes the question which has occupied much more of the time of the Court than any other, namely, the claim of *Peter Rumney* to be the owner of this copyright. For this claim I think there is no foundation. Whenever *Rumney* wanted copies he bought them of *Shore*, and paid *Shore* for them. He got, no doubt, copies containing the words and melody of the song, but of the copyright he never became the owner.

The action of the Plaintiffs must be dismissed; and they must pay the costs of the Defendants, except so far as those costs have been incurred by reason of the claim of *Peter Rumney;* as between the Defendants and *Peter Rumney* there will be no order as to costs.

I have said nothing about the objections being out of time, because the Plaintiffs' claim was defeated by defects in registration disclosed by his own evidence.

Solicitors: *Routh, Stacey, & Castle; Newbon, Harrison, & Co.*; *Howard Rumney.*

J. B. D.

KAY, J.
1883
April 9, 12.

In re WEBSTER'S ESTATE.
WIDGEN *v.* MELLO.

[1881 W. 925.]

Will, Construction of—Gift to "all the children of M." *who was dead, "or in event of decease to their descendants"—Substitutional or Original—Child of one of the Class who predeceased* M. *not entitled to share.*

Testator by will bequeathed all his share in an estate in *Barbadoes* "to all the children of" his dear departed wife's sister *M. H. M.*, "or in event of decease to their descendants share and share alike." *M. H. M.* had six children, of whom five were living at the date of the will and at the death of the testator, and one had died prior to the date of the will leaving issue an only daughter:—

Held, following the decision in *Christopherson* v. *Naylor* (1), that the issue of the child of *M. H. M.* who was dead at the date of the will, was not entitled to a share of the property, but that it went to the five children of *M. H. M.* who survived the testator.

AN action for administration. The Rev. *J. G. Webster*, who died in December, 1880, by his will made in July, 1879, after appointing by his will and a codicil made in December, 1880, three trustees, and executors, Defendants, and directing them to hold all his stocks, &c., and other securities upon the trusts mentioned, and bequeathing certain legacies, said, "All my share in the *Lower Berney's* estate in the Island of *Barbadoes* I bequeath the same to all the children of my dear departed wife's sister *Mary Henchman Mello*, or in event of decease to their descendants share and share alike." The action was brought by one of the legatees against the executors to have the trusts carried into execution, and the testator's estate administered by the Court.

Mary Henchman Mello had six children, of whom five were living at the date of the will and at the death of the testator, and one, *C. M. Yates*, the wife of *George Yates*, had died prior to the date of the will, leaving issue an only daughter. The question on the hearing of the further consideration and a summons which had been adjourned into Court, was whether the daughter of

(1) 1 Mer. 320.

KAY, J.
1883
In re WEBSTER'S ESTATE.
WIDGEN *v.* MELLO.

C. M. Yates was entitled to a share of the *Lower Berney's* estate, which was admitted to be personal estate of the testator.

Hastings, Q.C., and *W. Baker*, for the Plaintiff, stated the facts.

Kekewich, Q.C., and *Reginald Hughes*, for some of the children of *M. H. Mello*, submitted that upon the authorities of *Christopherson* v. *Naylor* (1); *West* v. *Orr* (2); *In re Hotchkiss's Trusts* (3); *In re Porter's Trust* (4); *Congreve* v. *Palmer* (5); *In re Philp's Will* (6); *Burt* v. *Hellyar* (7), the gift to the issue of *M. H. Mello* was substitutional, and that the daughter of Mrs. *Yates*, who was dead at the date of the will, could not take a share under the gift, therefore the property was divisible in fifths.

Robinson, Q.C., and *G. Welby King*, and *Rigby*, Q.C., and *Barrett-Lennard*, for parties in the same interest:—

The case of *In re Riddell* (8), and *Jarman* on Wills (9), were referred to.

W. Pearson, Q.C., and *Horsbrugh*, for the daughter of Mrs. *Yates*, submitted that as Mrs. *Yates* was dead, the gift "or in event of decease to their descendants share and share alike" was an original, and not substitutional gift, and consequently the daughter was entitled to an equal one-sixth share of the property. The question had been fully considered in recent cases, and amongst them the decisions in *In re Sibley's Trusts* (10), from which this case was not distinguishable; *In re Smith's Trusts* (11); *In re Potter's Trust* (12); *In re Hotchkiss's Trusts*; *In re Woolrich* (13); *Loring* v. *Thomas* (14); *West* v. *Orr*; *Wingfield* v. *Wingfield* (15); *Adams* v. *Adams* (16); *Burt* v. *Hellyar*; *In*

(1) 1 Mer. 320.
(2) 8 Ch. D. 60.
(3) Law Rep. 8 Eq. 643.
(4) 4 K. & J. 188.
(5) 16 Beav. 435.
(6) Law Rep. 7 Eq. 151.
(7) Ibid. 14 Eq. 160.
(8) W. N. 1880, p. 94.
(9) 4th Ed. vol. ii. pp. 778, 781.
(10) 5 Ch. D. 494.
(11) Ibid. 497, n.
(12) Law Rep. 8 Eq. 52.
(13) 11 Ch. D. 663.
(14) 1 Dr. & Sm. 497.
(15) 9 Ch. D. 658.
(16) Law Rep. 14 Eq. 246.

re Philp's Will (1); *Congreve* v. *Palmer* (2), were in favour of the child taking a share.

Fischer, Q.C., and *Farwell*, for the Defendants, the trustees and executors.

KAY, J. :—

In this case I have to decide the meaning of the words of gift of this *Barbadoes* estate. [His Lordship read the words, stated the facts, and continued :—] The question is whether the issue of the daughter of *M. H. Mello* who died before her, and before the will was made, is entitled to a share of the estate with the five children of *M. H. Mello* who were living at the date of the will and at the death of the testator. The law was settled long ago in the case of *Christopherson* v. *Naylor* (3). There a rule was laid down that where there is a gift to a class and then a substitutionary gift of the share of any one of the class who should die in the lifetime of the testator, no one can take under the substitutionary gift who is not able to predicate that his parent might have been one of the original class, and consequently if the parent was dead at the date of the will, and therefore by no possibility could have taken as one of the original class, his issue are not able to take under the substitutionary gift. Now beyond all doubt that is still the law. It was laid down in the case of *Christopherson* v. *Naylor*, and that case has been recognised by the Court of Appeal in the cases of *Hunter* v. *Cheshire* (4) and *West* v. *Orr* (5). What I have to consider is whether this gift be substitutionary, and in the next place, if it be so, whether the child of *M. H. Mello* who died before the date of the will can be treated as one of the original class. There has been an attempt made to distinguish the case from *Christopherson* v. *Naylor*, and many cases have been cited. In the first class of cases on the subject the contention has been that this is not a substitutionary, but is an original or a substantive gift like a gift to the children of *A.* and the issue of those who are dead. The second class of

(1) Law Rep. 7 Eq. 151.
(2) 16 Beav. 435.
(3) 1 Mer. 320.
(4) Law Rep. 8 Ch. 751.
(5) 8 Ch. D. 60.

KAY, J.
1883
In re WEBSTER'S ESTATE.
WIDGEN *v.* MELLO.

cases is like *Loring* v. *Thomas* (1), where there was a gift to the children of *A.*, and then a gift to the issue of any child who might be dead of the share which the parent would have taken if living, and Sir *R. Kindersley*, V.-C., pointed out that it was not necessarily a substitutionary gift in the sense of *Christopherson* v. *Naylor* (2), but a gift to the issue of the share which the parent of the issue would have taken if living at the death of the testator, which might well include the children of a parent who was dead at the date of the will. It was a class of cases which practically comes within the decision in *Tytherleigh* v. *Harbin* (3). Then there is the case which, it has been urged, is identical with the present, *In re Sibley's Trusts* (4), which was decided by the late Master of the Rolls. There the gift was "to all and every the children of his (testator's) uncle or their issue in equal shares," which the Master of the Rolls admitted was a substitutionary gift. In that case of the original class, six in all, four died before the date of the will, the remaining two were living at that date. The Master of the Rolls said (5), "It being then settled, as I said before, no further than that the 'or' is substitutionary for something, it does appear to me that, considering the state of the family, and the words used, there is nothing in the authorities to prevent my construing them literally and reading 'all and every the children' as meaning, not all the children he had then living, but all his children in the literal sense; and consequently I come to the conclusion that the issue of a child dead at the date of the will would take in the place of his parent, because that was really what the testator intended by his description of the first class, in other words he meant not only 'all the children now living,' but 'all the children my late uncle had,' and consequently that he meant the issue to take." The words were "all and every the children of his uncle," . . . "or their issue in equal shares." Now if "all the children of his late uncle" meant all the children he ever had, that attributes to the testator the intention of making all the children his uncle ever had legatees, although four of them were dead at the date of the will. I must

(1) 1 Dr. & Sm. 497.
(2) 1 Mer. 320.
(3) 6 Sim. 329.
(4) 5 Ch. D. 494.
(5) 5 Ch. D. 502.

say, with the utmost possible respect for so great an authority, that the stress laid on the words "all and every the children" does not satisfy me. I do not see what special force those words can have in a gift "to all and every the children," which is nothing more after all than a gift to the children. A gift to "the children of *A.*" is quite as large, and will confer benefits on as many as a gift to "all and every the children of *A.*" But it is enough for me to say that this case does not come within that decision, because the words here are "to all the children of my," &c., and there were living at the date of the will five children, not two, therefore the words "to all the children" are perfectly apt and proper words to describe the five children, or such of them as might survive the testator. Therefore the case of *In re Sibley's Trusts* (1) in that respect is not an authority which applies to the present case, and is not an authority which binds me or which I can properly follow, because the essential facts on which the reasoning was founded were entirely different. Then there are the cases like that of *In re Philp's Will* (2). There the testator bequeathed a fund for the use of his widow for life, "and after her death to be divided among my children then living or their heirs." In that case "or" seems to have been read "and," and the heirs of the children who predeceased the wife (including the two who were dead at the date of the will), were held entitled to share in the fund along with the children who survived her. But the reason given in the comment on that case in *Jarman* on Wills, is, that the words, read literally, "my children then living or their heirs," were contradictory, because clearly the children then living would take absolute interests, and the words the children then living or their heirs, read literally, were nonsense, and therefore the testator must have meant children then living, and the heirs of such as should be then dead, which brought the case within *Tytherleigh* v. *Harbin* (3). That case, however, has no reference to the one before me, because here there are not the words "then living," but simply "all the children of," &c.

There is another case which seems to have introduced a still

(1) 5 Ch. D. 494. (2) Law Rep. 7 Eq. 151.
(3) 6 Sim. 329.

KAY, J.
1883
In re WEBSTER'S ESTATE.
WIDGEN v. MELLO.

further distinction, viz., that of *In re Smith's Trusts* (1), printed in a note to *In re Sibley's Trusts* (2), and also decided by the late Master of the Rolls. There the words of gift were, "If *Sarah Smith* should have any money at her death, she wishes it to be equally divided amongst her brothers and sisters, after all expenses are paid. Should any of her brothers or sisters be dead, their share is to be equally divided amongst their children. If no children be living, the money to be divided amongst the surviving brothers and sisters of *Sarah Smith*." And the Master of the Rolls said, "the question is whether I am to attribute to this testatrix the capricious intention that, if a brother died before her will, his children should not take; but that, if a brother died after her will, his children should take. I am of opinion that I am not bound to do anything of the sort. She gives her money to be equally divided amongst her brothers and sisters, and then she says: 'should any of her brothers and sisters be dead, their share is to be equally divided amongst their children.' The words 'their share,' cannot mean a share given to a brother or sister who is dead, because you cannot give a legacy to a dead person, as the testatrix must have known; and consequently 'their share' must mean 'the share which they would if living have taken.' Therefore, I hold that the children of the brother who was dead at the date of the will are entitled to a share." That brings that case within *Loring* v. *Thomas* (3), where the word "share" was used. I have no such words here, so that this case is neither within *Tytherleigh* v. *Harbin* (4), *Loring* v. *Thomas*, *In re Philp's Will* (5), *In re Sibley's Trusts*, nor *In re Smith's Trusts*. No other distinction has been pointed out to me except that it is said in *Wingfield* v. *Wingfield* (6), Vice-Chancellor Sir *Charles Hall* read a gift which was somewhat like this, viz., "between my brothers and sisters then living, or their heirs," as including the heirs of a brother and sister who were dead at the date of the will, because that was, he thought, "more in accordance with the current of authority." That decision is the same as *In re Philp*. I have gone through the stream, or rather through the divided currents

(1) 5 Ch. D. 497, n.
(2) Ibid. 494.
(3) 1 Dr. & Sm. 497.
(4) 6 Sim. 329.
(5) Law Rep. 7 Eq. 151.
(6) 9 Ch. D. 658.

of the authorities, from *Christopherson* v. *Naylor* (1) down to the present time, and I know of no authority which says that a gift to children or their heirs without more entitles the heirs of children who were dead at the date of the will to take.

Therefore, I feel bound by the cases of *Christopherson* v. *Naylor* and *West* v. *Orr* (2), and the rule there laid down. It is clear that this is a substitutionary gift. For that *In re Sibley's Trusts* (3) is express authority, because there the words were "all and every the children . . . . or their issue," and the Master of the Rolls said that those were clearly substitutionary words. Therefore I am bound to hold that the words here, "or in the event of decease to their descendants," are substitutionary, and finding that I cannot bring this case within any of the exceptions which have been referred to, I am of opinion that I am bound to follow the decision in *Christopherson* v. *Naylor*, and hold that the issue of the child who was dead at the date of the will do not take; but that the property must go in fifths among the children who survived the testator.

Solicitors: *C. Berney Brown; Brown & Woolnough; Stuart & Tull.*

T. F. M.

In re HAWTHORNE. GRAHAM *v.* MASSEY.

[1882 H. 416.]

Jurisdiction of the Court—Contested Claim to Land situate in Foreign Country—Parties resident in England—Action dismissed.

The title to immoveable property in *Saxony* was in dispute between *A.* and *B.* *A.* sold the property in *Saxony*, received part of the purchase-money, and took a mortgage for the balance. Both *A.* and *B.* being in *England*, an action by *B.* to make *A.* account for the purchase-money was dismissed for want of jurisdiction.

THIS action was brought to recover three-fourths of one moiety of the purchase-money of a house at *Dresden*, sold by *Charles*

(1) 1 Mer. 320. (2) 8 Ch. D. 60.
(3) 5 Ch. D. 494.

KAY, J.
1883
In re HAWTHORNE.
GRAHAM *v.* MASSEY.

Stewart Hawthorne, the testator in the cause. The Defendants were his executors and devisees in trust. The house originally belonged to Colonel *Hawthorne*, a domiciled Irishman, and his wife *Sarah* jointly. By his will, dated in 1851, he gave all his real and personal estate, which would include his moiety of this house, to trustees in trust to pay the rents, profits, and proceeds thereof to his wife *Sarah* for life, and after her death upon trust for his daughter *Mabella*. This will was not executed according to Saxon law.

Colonel *Hawthorne* left his widow and a daughter, *Georgiana*, him surviving, *Mabella* having died in his lifetime. The widow died on the 31st of May, 1875, leaving a will executed according to Saxon law by which she devised all her real and personal property at her residence at *Dresden*, including this house, to *Charles Stewart Hawthorne*, the testator in this cause. In 1875 he sold the house, received part of the purchase-money, and the remainder, amounting to 66,000 marks, was secured to him by a mortgage of the house according to Saxon law. He died in 1877. The Plaintiffs in this action were the administrator and the widow and children of *John Graham*, the surviving husband of *Georgiana*.

The statement of claim alleged, in effect, that on the death of Colonel *Hawthorne* one moiety of the house, subject to his widow's life interest, devolved by Saxon law as to three fourth parts on *Georgiana*, and the remaining one-fourth on *Sarah Hawthorne*, who was entitled to the other moiety, and that on the death of *Georgiana* in 1863, *John Graham* became by Saxon law entitled to her three fourths of one moiety, and that he died intestate. The Plaintiffs, as his administrator and next of kin, respectively claimed three fourths of one moiety of the purchase-money, with interest, against the estate of *Charles Stewart Hawthorne*. It was also alleged that on the death of *Sarah Hawthorne*, *Charles Stewart Hawthorne* procured himself to be registered in *Dresden* as the owner of the house, and so became the legal owner, and that by Saxon law he could confer an indefeasible title on a purchaser, but that a seller under such circumstances became by the law responsible to the person really entitled, if he had acted *bonâ fide*, for the purchase-money of which he became a trustee for the

person really entitled. The defence denied utterly the claim of the Plaintiffs, and alleged that *Charles Stewart Hawthorne* was sole and legal owner of the entirety of the house for his own use and benefit, and the Defendants (par. 19) submitted that the rights of the parties to this action ought to be determined in the Courts of *Saxony*.

Hastings, Q.C., and *W. C. Druce*, for the Plaintiffs:—

What the Plaintiffs claim is an account against the Defendants of the purchase-moneys received by their testator with directions as to getting in the mortgage debt which represents the remainder of the purchase-moneys, and payment to them of their proportion of the whole. All the parties are resident within the jurisdiction, and if the Plaintiffs establish their title, the Court will enforce their rights, although the property from which the purchase-moneys arose is in a foreign country.

The Court has jurisdiction *in personam* upon equities arising out of transactions concerning lands abroad, and in the exercise of such jurisdiction has enforced an equitable mortgage made in *England* of lands situate in *Scotland*: *Ex parte Pollard* (1); and has held a purchase of land in the colonies by a creditor to be only a security for his debt, and decreed reconveyance accordingly: *Lord Cranstown* v. *Johnston* (2).

W. Pearson, Q.C., and *Creed*, for the Defendants:—

The real question in this case is as to the title to land in a foreign country—*i.e.*, whether in 1875, when this house in *Dresden* was sold, three fourths of a moiety of it belonged to *John Graham*, and that is a question which must be determined according to the *lex situs*—in other words, by the Courts of *Saxony*; and which an English Court has no jurisdiction to entertain.

The only classes of cases where the Court assumes jurisdiction with reference to a proprietor of foreign immoveables are those in which it can act *in personam* to compel him to give effect to some obligations arising from his own contract, such as *Ex parte Pollard* (where the question was not as to the title to the land,

(1) 1 Mont. & Ch. 239. (2) 3 Ves. 170.

KAY, J.
1883
In re HAWTHORNE.
GRAHAM v. MASSEY.

but whether an equitable mortgage made in *England* should be enforced against the debtor's assignees in bankruptcy as representing his person), and cases of tort or fraud, such as *Lord Cranstown* v. *Johnston* (1); neither of which classes of cases are applicable here. And to entertain a case like this would be extending the jurisdiction of the Court further than it has ever been carried before.

[They referred to *Westlake's* International Law (2) and *Penn* v. *Lord Baltimore* (3).

Robinson, Q.C., and *Jolliffe*, for other parties.

Druce, in reply.

KAY, J.:—You are asking the Court to declare that *Charles Stewart Hawthorne* was a constructive trustee of lands in *Dresden* of which he had taken possession, and procured himself to be registered as owner. This is no question of contract, but simply one of the right of succession to foreign lands.

Druce:—The Court will assume jurisdiction when the remedy can be given simply by proceedings *in personam*.

May 7. KAY, J.:—

An important question of jurisdiction arises in this case. [His Lordship after stating the facts as above set forth, continued:—] It is obvious that neither *Charles Stewart Hawthorne* nor the Defendants is or are with reference to this claim by English law in any fiduciary relation to the Plaintiffs. They are not bound by contract with them. Nor is the claim in any way based upon a suggestion of fraud. It is a *bonâ fide* claim on both sides of title to land, or the proceeds of land, in *Saxony*.

The claim depends primarily upon the law of *Saxony* as to the devolution of land in that country. If maintainable it can only be so upon the ground that by the law of *Saxony* upon the death of *Sarah Hawthorne* three-fourths of one moiety of this property

(1) 3 Ves. 170. (2) Pages 182, 183.
(3) 1 Ves. Sen. 444.

descended to *Georgiana Hawthorne*, under whom the Plaintiffs claim. The next question is whether the Plaintiffs by the law of *Saxony* are entitled to such interest, if any, as did so descend to *Georgiana Hawthorne*. A third question is, whether by Saxon law, *Charles Stewart Hawthorne* having sold the property, he or his estate after his death is accountable for a share of the purchase-money to the Plaintiffs.

I need not dwell upon the danger of error if the Courts of this country were to entertain jurisdiction to determine a contested claim of this kind depending upon questions of foreign law. I may, perhaps, illustrate it by one of the arguments used before me. I have a number of opinions, not on oath, by foreign lawyers. One of these states that the time for ascertaining the heir of Colonel *Hawthorne* in this case was the death of *Sarah Hawthorne*, because of the devise to trustees during the life of *Sarah*, which although in an Irish will, would be recognised in *Saxony*. This part of the opinion, it is said, is not answered or noticed by the expert on the other side, and therefore the Court must assume that it is admitted to be the law. How is it possible to be judicially satisfied on such evidence?

I am not aware of any case where a contested claim depending upon the title to immoveables in a foreign country strictly so called, being no part of the British dominions or possessions, has been allowed to be litigated in this country simply because the plaintiff and defendant happened to be here. Lord *Mansfield* in *Mostyn* v. *Fabrigas* (1) distinguished such a case from those in which actions might be brought here. He said: "So if an action were brought relative to an estate in a foreign country, where the question was a matter of title only, and not of damages, there might be a solid distinction of locality." The cases cited in the argument were such as the enforcement in *England* of an equitable mortgage made in *England* concerning Scotch land, where the Court gave relief, treating the remedy as in the nature of specific performance, when the Court acts *in personam*: *Ex parte Pollard* (2). There is no doubt of the jurisdiction in such a case and the Courts will even foreclose an English mortgage of foreign

(1) 1 Cowp. 161, 176. (2) 1 Mont. & Ch. 239.

KAY, J.
1883
In re HAWTHORNE.
GRAHAM *v.* MASSEY.

land: *Toller* v. *Carteret* (1); the foreclosure decree being, as Vice-Chancellor *Bacon* pointed out in *Paget* v. *Ede* (2), merely an extinction of the right to redeem, as was said also by Lord *Cranworth* in *Colyer* v. *Finch* (3). In *Norris* v. *Chambres* (4), Lord *Romilly* distinguished the case of a foreign mortgage of foreign land where no relief by foreclosure would be given by the English Courts. There is a class of cases in which jurisdiction as to lands in the colonies has been maintained on the ground of fraud, like *Lord Cranstown* v. *Johnston* (5). It is not pretended that there was any fraud in the present case.

Perhaps the decision that goes furthest in the Plaintiff's favour is the recent case of *In re Orr Ewing* (6). There, a legatee under a Scotch will or trust deed was allowed to maintain an action for administration against the executors who had proved in *England*, three of whom were in this country and the others had been served in *Scotland*, without objection. The usual administration order was made though there were no assets in *England;* but the late Master of the Rolls and Lord Justice *Cotton* both pointed out that the plaintiff's claim was undisputed, and the Master of the Rolls repudiated the notion that *Scotland* is a foreign country for the purpose of such a question of jurisdiction. According to *Enohin* v. *Wylie* (7) if the claim had been contested and had involved a disputed question of the construction of a Scotch will, it may be doubted if a decree could properly have been made.

But the case is infinitely stronger where the contested claim is based upon the right to land, where that land is situate, not in *Scotland* but in *Dresden*, where the question whether the Plaintiff has any claim or not, must be determined by the law of *Saxony* as to immoveables, and where the only ground for instituting proceedings in this country is the fact that the Defendants are resident here. All these circumstances concur in this case, and in my opinion the Courts of Civil Judicature in *England*, which

(1) 2 Vern. 494.
(2) Law Rep. 18 Eq. 118.
(3) 5 H. L. C. 905, 915.
(4) 29 Beav. 246.
(5) 3 Ves. 170.
(6) 22 Ch. D. 456.
(7) 10 H. L. C. 1.

sit, as Lord *Westbury* said in *Cookney* v. *Anderson* (1), to administer the municipal law of this country, have no authority to determine in such a case as this whether or not the Plaintiff's claim is well founded, and I must therefore dismiss this action.

Solicitors: *Markby, Wilde, & Burra; Henry White; Bower, Cotton, & Bower*, agents for *Sharp & Son, Lancaster.*

(1) 1 D. J. & S. 365.

T. F. M. AND W. W. K.

CHITTY, J.

1883

June 9.

In re MACKENZIE'S TRUSTS.

Petition for Advice—Will—Money to be laid out in the purchase of Land to be settled in Strict Settlement—Investment in Debenture Stock—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 (1), 21, 22 (2), (4), 33, 44, 51, 56 (2).

Where under a will money is bequeathed to trustees in trust to lay it out in the purchase of land, to be settled in strict settlement, the trustees may invest it in debenture stock in accordance with the provisions of sect. 21 of the *Settled Land Act*, 1882.

UNDER the will of the late *Edward Mackenzie*, who died in 1880, £200,000 was left to trustees in trust to lay out the same in the purchase of estates to be settled to the use of one of the testator's younger sons for life, with remainder to uses in favour of his issue in tail, with remainders over, and with a direction that until a proper purchase was found the legacy should be invested in Government or real securities but not in any other mode of investment. Two other large sums were left upon the same terms for the benefit of the other younger sons of the testator. The sons being desirous that their legacies should not be laid out in the purchase of estates, requested the trustees to invest the legacies in debenture stock as mentioned in sect. 21 of the *Settled Land Act*, 1882, and this was a petition by the trustees asking for the advice of the Court on the point.

Macnaghten, Q.C., and *Davenport*, for the petitioners:—

We submit that the definition of "settlement" in sect. 2 (1) of the Act is not exhaustive, and further that the word "settlement" in sect. 33 would apply to money to be laid out in land, as well as to land and money derived from the sale of land. But even if that is not so, the tenants for life could immediately upon a purchase of land being made by the trustees, effect their object by selling the land and investing the proceeds as desired.

CHITTY, J.:—

I do not think it necessary to go into the question raised as to the meaning of the word "settlement" in sect. 33 of the Act,

but I am of opinion that the trustees may make the required investment, as it is absurd to suppose that that could not now be done which a tenant for life could without question do after an estate had been purchased, by selling the estate and investing the moneys arising from the sale as asked for by this petition.

Solicitors: *Cunliffe, Beaumont, & Davenport.*

G. M.

PEARSON, J.

1883

Feb. 15, 17, 21.
June 2.

WHEELWRIGHT *v.* WALKER.

[1883 W. 423.]

Settled Land Act, 1882 (45 & 46 *Vict. c.* 38)—*Will made in* 1834 *creating Trust for Sale by Trustees after Death of Tenant for Life—Sale of Property by the Reversioner in* 1880—*Notice under sect.* 45 *by Tenant for Life to Trustees of Settlement—Power of Tenant for Life to sell the Fee Simple.*

J. W., by his will, devised an estate to trustees upon trust to receive and pay the rents to his grandson for life, and after his decease to sell and to stand possessed of the moneys for all the grandson's children. The tenant for life was upwards of seventy years of age, and a widower. He had one child only, a daughter, and she and her husband in July, 1880, contracted to sell her reversion in the estate to the Plaintiff. The *Settled Land Act* (45 & 46 Vict. c. 38) came into operation in January, 1883, and the tenant for life at the end of that month advertised the estate for sale under the powers of the Act. The Plaintiff brought an action for an injunction to restrain the tenant for life from selling; and to restrain the other Defendants, devisees of the legal estate under the will of the survivor of trustees of *J. W.*'s will appointed by the Court, from executing any assurance of the estate, and on motion for that purpose:—

Held, that the tenant for life had power under the Act to sell the fee simple and inheritance of the property if he should comply with the provisions of the Act; but held also that there were no trustees to whom he could under sect. 45 give notice; and an injunction was granted to restrain him from selling until trustees had been properly appointed for the purposes of the Act.

Held, also, that the Plaintiff was entitled to be served with any summons for the appointment of new trustees, and (the Plaintiff objecting) that the Defendant's solicitor ought not to be appointed.

JOHN WALKER, who died in 1836, by his will made in December, 1834, after appointing three executors and trustees, devised to them and the survivors and survivor and the heirs of such survivor the hereditaments and premises called the "*Goat House*" estate, near *Ripponden*, *Yorkshire*, and directed them to let and manage and receive the rents and profits thereof. He gave an annuity for life to a granddaughter (who died in 1853), and directed that after her death the trustees should raise the sum of £500 on mortgage for the benefit of her children, or in default of any to be paid to other persons named. The testator then directed that the trustees should, subject to the annuity and

mortgage, be seised of the estate in trust for his grandson *John Walker* (the first named Defendant) and his assigns, and should receive and pay the rents to him or them or suffer him or them to receive them, after keeping the premises in good repair, for his life, and after his decease upon trust to sell and dispose of the estate by public auction or private contract, either together or in lots, and at one time or at different times, and should stand possessed of the moneys upon trust for all and every the children or child of *John Walker*, to become vested as to sons at twenty-one years of age, and daughters at that age or marriage. A mortgage was effected by the surviving trustee of the will in 1853 for the sum of £500.

John Walker was at the commencement of this action a widower upwards of seventy years of age. He had one child, *Elizabeth*, the wife of *Ezra France*, and they had three children, all infants. No settlement was made on the marriage of Mr. and Mrs. *France*.

On the 27th of July, 1880, Mr. and Mrs. *France* entered into a contract to sell her reversion in the estate on the terms that the purchaser *John Wilkinson Wheelwright*, the Plaintiff, should pay £3350 for it, *i.e.*, £1350 down as a deposit, and £2000 (less the £500 owing on the mortgage) at the death of *John Walker*, with interest at 4½ per cent. on the balance during his life. There was to be a proper conveyance after *John Walker's* death, and should *John Walker* have any other child the contract was to be null and void, and the vendors were to repay the deposit moneys and all interest received by them in respect of the unpaid balance. The sum paid by *John Wilkinson Wheelwright* as deposit moneys was settled by a deed of this date.

The three trustees appointed by the testator died many years ago. By an order made by the Court in July, 1863, three other trustees were appointed, and the trust estate was vested in them. Those trustees had all died, and the legal estate was vested in the Defendants *T. B. Chambers* and *Richard Walker*, the devisees of the trust estate of *A. C. Pitchforth*, the survivor of them.

John Walker and the devisees had notice of the deed of 1880. It was properly executed and registered at *Wakefield*.

On the 27th of January, 1883, a firm of auctioneers at *Halifax*

PEARSON, J. 1883 WHEELWRIGHT v. WALKER.

advertised in a local newspaper that they would, unless the same was previously disposed of by private treaty, offer for sale by auction "under the powers of the *Settled Land Act*, 1882" (45 & 46 Vict. c. 38), the "*Goat House*" estate. The property was fully described, and it was stated that it would be offered in lots, and that further information might be had upon application to *John Walker* "the tenant for life" and certain solicitors.

On the 30th of January, 1883, *John Wilkinson Wheelwright*, not having received any answer from *John Walker* in reply to a remonstrance which he addressed to him in reference to the advertisement, issued a writ in this action against *John Walker*, and *T. B. Chambers* and *Richard Walker*, who were sued as the trustees of the will, claiming injunctions to restrain *John Walker*, "his auctioneers, solicitors, and agents from selling or contracting to sell or advertising or otherwise offering for sale" the estate, and to restrain the other Defendants "from executing any assurance" of the estate "or any part thereof, or dealing in any way with their estate therein, or with any of the muniments of title relating thereto, except to or according to the directions of the Plaintiff," and for such order as to costs as the circumstances of the case might require.

Hastings, Q.C., and *W. Donaldson Rawlins*, for the Plaintiff, moved for injunctions in the terms of the notice of motion:—

Pitchforth's devisees are not trustees within the meaning of sect. 2, sub-sect. 8 of the Act, *i.e.*, "the persons who are for the time being under a settlement trustees with power of sale of settled land." Sect. 45 enacts that "a tenant for life when intending to make a sale . . . shall give notice of his intention . . . to each of the trustees of the settlement" in the manner prescribed, and sub-sect. 2 of the same section provides "that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement." It does not appear that the trustees have any power to stop a sale; but it is enacted, sect. 44, that "if at any time a difference arises between a tenant for life and the trustees . . . respecting the exercise of any of the powers of this Act . . . the Court may on the application of either party give such directions

respecting the matter in difference . . . as the Court thinks fit," and probably the Court would, on any such application, consider whether the tenant for life was acting *bonâ fide* for the interests of all persons entitled under the settlement; and it would restrain a sale if it appeared that the tenant for life was disregarding the rights of those in remainder. This seems clear looking at sect. 53, which enacts that "a tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties." Being placed in the position of a trustee, a tenant for life would not be allowed to exercise his powers improperly. Having regard to the rights of the parties interested, it is submitted that it is not within the scope of the Act, or if it be, that the provisions of the Act have not been complied with by the tenant for life, and therefore the proposed sale ought to be restrained by the Court.

W. Pearson, Q.C., and *E. W. Byrne*, for the Defendants:—

The object of the Legislature in passing the Act was to enable tenants for life to sell settled estates. The tenant for life in this case desires to sell and to invest the proceeds of sale so that he may have a larger income, and he is fully entitled to exercise the powers given to him.

[PEARSON, J.:—Could it have been intended to set aside sales of reversionary interests validly made before the Act was passed.]

The Plaintiff, who obtained an assignment from the reversioner of her interest, can be in no better position than his assignor. The tenant for life can sell the property regardless of the interests of those in remainder. He can sell it notwithstanding the sale which has been made to the Plaintiff. Looking at the language of sect. 2, sub-sect. 8, it is submitted that no distinction can be drawn between a trust and a power of sale and that the two trustees, Defendants, are trustees within the definition. As to sect. 44, no difference between the tenant for life and the trustees has arisen, and, so far as sect. 45 is concerned, there is no statement that notice has not been given to them, and no question arises in regard to that section. Sect. 50, sub-sect. 1, is in favour

PEARSON, J. 1883 WHEELWRIGHT v. WALKER.

of the tenant for life, as it prohibits the assignment of his powers of sale; and so is sect. 51, which makes void attempts to limit the powers of a tenant for life. Sect. 53 he will take care to bear in mind, and "have regard to the interests of all parties." Sect. 56, which preserves other powers of tenants for life, may be noticed in passing. Sect. 54 protects a *bonâ fide* purchaser, and sect. 45, sub-sect. 3, shews that he need not inquire respecting the giving of notices. Sect. 20 shews what large powers are given to a tenant for life, and the tenant for life in this case is fully entitled to exercise them—he can sell by private contract or by public auction, provided he sells for the best price, and the Court has no power to restrain him. Sects. 21 and 22 shew how the proceeds of sale are to be invested and dealt with. There is nothing in the Act which gives a right to trustees to interfere with the tenant for life in the exercise of the powers conferred upon him. Can it be contended that if there were no trustees and the Court, under sect. 38, declined to appoint any, the tenant for life would be deprived of his powers?

[PEARSON, J.:—If there be no trustee no notice can be given, and the powers cannot be exercised. The Court has a discretion given to it, the words being, "The Court may, if it thinks fit . . . appoint fit persons to be trustees." On what principle the discretion is to be exercised it is difficult to see.]

Looking at the whole scope of the Act a tenant for life has powers of the widest description to dispose of the property, subject only to the provisions in sect. 4—the Court has no power to say there shall be no sale—and sect. 2, sub-sect. 1, extends to settlements made before the passing of the Act, and it applies to this case, though the reversion was purchased by the Plaintiff before the Act was passed. The motion for an injunction ought to be refused; but if it should be considered that there are no trustees, and the Court should grant an injunction, it should be limited to take effect only until such time as there shall have been trustees appointed, or there will be an interference with the rights of the tenant for life.

Hastings, in reply:—

It is submitted that the tenant for life is attempting to use the

powers conferred by the Act in a case to which it was not contemplated by the Legislature that they should apply. The right of a purchaser of a reversion in land, to have the subject-matter of his purchase, and not as money, is higher than that of the reversioner, whose right is under the settlement merely. The Plaintiff's right is under the deed of July, 1880, and certainly before the passing of the Act no person had any right to interfere with it.

[PEARSON, J.:—Suppose a railway company had purchased the property.]

The *Lands Clauses Acts* are very special, and are made applicable to particular lands, but the *Settled Land Act* is a general one and applies to all tenants for life of lands. There is no machinery provided for remaindermen coming to the Court with objections to proposed sales under the Act, as owners of land can do in cases where their land is taken compulsorily. The other point, that there are no trustees under the Act to whom notice can be given is clear, and has not been seriously disputed.

Feb. 17. PEARSON, J.:—

This case is one of the first, I believe, which has arisen under the *Settled Land Act*, 1882, and it raises certainly very important questions as regards the matter at the present moment before me, and opens also many considerations in reference to the Act of a very serious character. I have taken the opportunity of reading the Act carefully through since I had the advantage of hearing the arguments which were addressed to me by counsel, and I am now about to determine, so far as I can, what appears to me to be the manifest wording and the plain construction of the Act. The question on the present occasion arises in this way: the Plaintiff *J. W. Wheelwright*, seeks to restrain the Defendant, *John Walker* who is tenant for life of the property in question in the case, from selling the property under the Act. The Defendant *John Walker* contends that he is entitled to sell the property under the Act. The question which I have to determine is whether, under the circumstances in which the property is situate, *John Walker* is right in his contention, or the Plaintiff *J. W. Wheelwright* is right

PEARSON, J. 1883 WHEELWRIGHT v. WALKER.

in his. *John Walker* takes an interest in this property, which is a public-house and other premises and closes of land, under the will of his grandfather, *John Walker*, and under the will he is equitable tenant for life, and subject to his tenancy for life the property was devised to three trustees upon trust to sell and divide the proceeds amongst all and every the children and child of the Defendant *John Walker*. *John Walker* has one child, a daughter, married to *Ezra France*, and they have several children. Many years ago *Elizabeth France* attained a vested interest in the property, subject only to be divested, as to more or less of that interest, if her father should have other children. Her father is now upwards of seventy years of age, and a widower, and the probability of his having any more children is small. For the purpose of what I am going to say I shall treat the question as if *Elizabeth France* was really and absolutely entitled to the fee simple in remainder, subject to the life estate of her father, and I do so because in that way I shall try the question much better than if I imagined that her share was liable to diminution by reason of her father having other children. This being the state of things, on the 20th of July, 1880, *Elizabeth France* and her husband sold her remainder in fee to the Plaintiff *J. W. Wheelwright*, and, as the law then stood, the Defendant *John Walker* had no power to sell the property, and the trustees had no power to sell the property during *John Walker's* life. But *Elizabeth France* and her husband had power to sell her interest in the property as real estate, subject to the prior life interest, and the Plaintiff *J. W. Wheelwright* obtained a title to it as landed property. He was entitled at that time to expect that at the death of *John Walker* he would succeed to it as real property, without the possibility of its being sold over his head by the tenant for life or the trustees. On the 1st of January, 1883, there came into operation the *Settled Land Act*, 1882. It received the royal assent on the 10th of August, 1882, and under the 3rd section of the Act a tenant for life may sell the settled land or any part thereof. So far as I can see, there is no restriction whatever in the Act on the power of a tenant for life to sell. There is nothing that I can see in the Act to enable the Court to restrain him from selling, whether he desires to sell because he is

in debt, and wishes to increase his income; or whether, without being in debt, he thinks he can increase his income; or whether he desires to sell from mere unwillingness to take the trouble involved in the management of landed property; or whether he acts from worse motives, as from mere caprice or whim, or because he is desirous of doing that which he knows would be very disagreeable to those who expect to succeed him at his death. There is not, so far as I can see, any power either in the Court or in trustees to interfere with his power of sale. The first question to be considered, the powers of the Act being so large, is, whether or not this property, being situate as it is, there having been a sale to the Plaintiff *J. W. Wheelwright* at a time when he thereby acquired a title to it, is or is not settled property within the meaning of the Act, so as to entitle the tenant for life to exercise a power of sale under the Act. In order to determine that, it is necessary to look at the definition of the word "settlement," which is found in sect. 2, sub-sect. 1, and is as follows:—[His Lordship read the sub-section.] Now, first of all, I will assume that the deeds which I am going to mention were executed after the Act, so that there could be no question whatever of the Act applying to them. I will take this instance. A testator by his will gives property to *A.* for life, remainder to *B.* in fee simple, and dies, and *B.* is minded to make a settlement of the reversion which will come to him and he accordingly settles it on himself for life, with remainder to his son for life, and in the event of his son's marriage settles it on his son's children in succession in the usual form in which settlements of real estate on marriage are made. I have, then, these two instruments, a will and a marriage settlement, under which the property is limited "in trust for any persons by way of succession." I conceive that these two instruments—inasmuch as the Act says "any number of instruments" form a settlement—together form a settlement, and that settlement being comprised in these two instruments, the tenant for life has power to sell under the Act the settled property over the heads of all those in remainder. I think it almost impossible to say that that is not the true construction of the Act, and I say so for these amongst other reasons. First of all, it seems to me that this is the import of the words themselves; but, if not,

PEARSON, J. 1883 WHEELWRIGHT v. WALKER.

then I may observe that the Act provides for the exercise of other powers given to tenants for life by the Act, and amongst them are powers as to the improvement of lands, very large powers indeed, and powers which I shall refer to presently, and which relate to the question as to who are the trustees under the settlement to be served with notice. These powers are stated in the 25th section; but in the 28th section it is enacted that "the tenant for life, and each of his successors in title, having under the settlement a limited estate or interest only in the settled land, shall . . . . maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this Act," and so forth. It is quite plain, therefore, that what is referred to in the Act, and intended to be comprised in it, was, in many cases, a succession of tenants for life having limited interests, all of whom were to be benefited by and bound by the acts of the first tenant for life; and seeing that the result would be, in the case which I have supposed, that there would be created a succession of life estates in the land, and seeing also that any number of instruments taken together form a settlement, I cannot help coming to the conclusion that in such a case the tenant for life under the will would be the tenant for life under the Act, and as tenant for life under the Act, no power of sale in the will and no power of sale in the settlement would affect him, but he would nevertheless have power to sell under the Act. If that be so, it will make no difference whether the instruments be executed before or after the passing of the Act, because the definition in the section expressly applies to all instruments, whether made "before or after, or partly before and partly after, the commencement of the Act." Now if *Elizabeth France*, instead of selling the property to the Plaintiff *J. W. Wheelwright*, had simply settled it, on her marriage, on herself as tenant for life, with remainder to her children, I am of opinion that this Act would have applied, and her father, as tenant for life under the will, could have exercised the power of sale as tenant for life under the Act. I think it makes no difference that *Elizabeth France* simply sold to the Plaintiff *J. W. Wheelwright* instead of settling her interest. I find nothing whatever in the Act which gives any person entitled in remainder any power of any sort or description

to interfere with the right of the tenant for life to sell. So far as I can see, the object of the Act is to enable the tenant for life of real estate comprised in a settlement to take it out of the settlement, and to substitute for it, *ex mero motu*, the value of it in pounds, shillings, and pence. I come now to the next question which has been raised. It was said that the tenant for life may have a power to sell, but that there are no trustees here; that trustees are required to be in existence under the Act, and that the tenant for life cannot sell unless there be trustees under the Act, because he is required to give them notice. The question as regards notice turns first on sect. 2, sub-sect. 8. The trustees there are described thus:—[His Lordship read the sub-section.] Then comes sect. 38, which provides for the appointment of trustees by the Court. [His Lordship read the section.] And then comes sect. 45, which requires notice to be given to the trustees [His Lordship read the section], and that is followed by sub-sect. 2, which provides that the trustees shall not be less than two unless a contrary intention is expressed. Now there can be no doubt whatever from the terms of the will that there are no trustees here with power to sell the settled land, or with power to consent to or to approve of the exercise of such a power of sale, because I must construe the words in sub-sect. 8 of sect. 2, "The persons, if any, who are for the time being . . . . trustees with power of sale of settled land," as meaning trustees with power of sale at the present time. I do not think the words can mean merely a power to sell at some future period. I think they mean a present power of sale; or of consent to, or approval of, the exercise of such a power of sale. It is not immaterial to observe that the duty of the trustees, under the Act, is in some respects undoubtedly of very great importance. They may consent to improvements, and if they consent the tenant for life may make them. They may consent to the cutting down of trees, and if they consent the tenant for life will be entitled to cut them down; and altogether, although I do not see exactly what power or control they have over the tenant for life in regard to selling the property, it is quite plain from the whole scope of the Act that the trustees are considered as having an important duty to perform; at all events, I think it clear that even as regards a sale

PEARSON, J. 1883 WHEELWRIGHT v. WALKER.

they have this important duty to perform, that if a tenant for life attempted to commit what may be called a fraud, and proposed to sell the property for something infinitely below its real value, it would be the duty of the trustees to come to the Court and ask for an injunction to restrain a sale. I do not think it would be right for them to leave the remainderman to take the objection at some remote period when the evidence might be very conflicting as to the circumstances under which the sale was made, and as to the value of the property; but I think it would be the trustees' duty to bring the matter before the Court, and the Court would have power in that case of controlling the sale, and the more so because the 53rd section of the Act states that "a tenant for life shall in exercising any power under this Act . . . . be deemed to be in the position and to have the duties and liabilities of a trustee for" all parties. I assent to Mr. *William Pearson's* argument that a tenant for life in selling under the Act must sell as fairly as trustees must sell for the tenant for life and for those in remainder. I had great difficulty at one time in seeing why any direction should be given to enable persons to come to the Court if differences arose, but I now think that there may be matters as to which differences may arise; for instance, the cutting down of timber, and the making of improvements upon the land, require either the consent of the trustees or the sanction of the Court; consequently, if there should arise disputes between the tenant for life and the trustees as to improvements of the estate, or the cutting down of timber, the Court could intervene and decide whether the objection of the trustees was sound, or whether the tenant for life ought to be allowed to do what he contemplated doing. Now, there are certainly no trustees here who come within the meaning of the Act. But by the 38th section power is given to "the tenant for life," or any other person having an interest in the settled land, to come to the Court, and then the Court "may, if it thinks fit, ... appoint fit persons to be trustees under the settlement for the purposes of this Act." I think, therefore, that *John Walker*, the tenant for life, has himself power to sell the fee simple and inheritance of this property if he should comply with the provisions of the Act, but I also think that he has been proceeding, up to the present moment,

precipitately, because there are no trustees to whom he can give notice, and therefore I shall grant an injunction to restrain him from selling or offering for sale the property until such time as there shall have been appointed proper trustees of the will for the purposes of the Act, to whom notice can be given and until due notice shall have been given to them of the intention to sell.

Feb. 21. An application *ex parte* was now made by *Hastings*, Q.C., on behalf of the Plaintiff, for an order directing the Defendant, *John Walker*, to serve the Plaintiff with notice of any application which he might make under sect. 38 of the Act, for the appointment of new trustees. It was stated that the Plaintiff's solicitors had asked the Defendant's solicitors to undertake not to make any such application without serving the Plaintiff, and that the Defendant's solicitors had refused to give any undertaking, on the ground that, having regard to the 6th rule of the *Settled Land Act* rules, it would not be proper to serve the Plaintiff with notice unless the Judge had directed such service to be made.

[PEARSON, J.:—The proper time to make such an application would appear to be after a summons for the appointment of trustees has been taken out.]

In this case the tenant for life, who is desirous of effecting a sale, is at arm's length with the remainderman, and might possibly take out the summons and obtain the order behind his back.

PEARSON, J.:—Under the circumstances I will make the order.

June 2. On a summons (adjourned into Court) by the Defendant *Walker* for the appointment as new trustees of the testator's will of the devisees of *Pitchforth*, it appeared that one of them was *Walker's* solicitor, and an objection being taken to his appointment by the Plaintiff, the Court (*Kay*, J.) directed that some other person should be nominated.

Solicitors: *Bolton, Robbins, & Busk*, agents for *L. H. Symonds, Ripponden; Torr, Janeways, & Co.*, agents for *Chambers & Chambers, Brighouse.*

T. F. M.

PEARSON, J.

1883

May 7.

WILSON *v.* COXWELL.

[1874 W. 211.]

Executor—Retainer—Creditor in higher Degree—Executor of Executor of original Testator—Hinde Palmer's Act (32 & 33 *Vict. c.* 46), *s.* 1.

The right of retainer by an executor has not been abolished by *Hinde Palmer's Act*, nor has it been enlarged so as to enable the executor to retain his debt as against a creditor of higher degree than himself.

Notwithstanding the Act, an executor who is only a simple contract creditor of his testator cannot retain his debt as against a specialty creditor.

If an executor dies after having claimed a right of retainer, but without having actually exercised it, leaving another executor of the original testator surviving, the executors of the deceased executor have the right of retainer for the benefit of his estate.

Hopton v. *Dryden* (1) distinguished.

A right of retainer being claimed on behalf of the estate of an executor who was a simple contract creditor of the testator, and there being a specialty creditor:—

Held, that the assets must (after payment of costs) be apportioned on the footing of giving an equal dividend to all the creditors (specialty and simple contract); that the dividend must be paid in full to the specialty creditor; that the executor must then retain his debt out of the residue; and that the surplus (if any) must be divided equally among the simple contract creditors.

FURTHER CONSIDERATION.

This was a suit by a creditor to administer the estate of *J. R. Stebbing*, who died on the 2nd of June, 1874. The assets were not sufficient to pay the testator's debts in full. The Plaintiff was a specialty creditor. The Defendants were *Edward Coxwell* and *Henry Sandy*, the testator's executors. *Edward Coxwell* was himself a simple contract creditor of the testator, and before the date of the Chief Clerk's certificate he had died. His executors claimed a right to retain out of assets of the testator, which were in Court, the amount of the debt due by the testator to *Edward Coxwell*. *Edward Coxwell* had before his death filed affidavits in proof of his debt, and in them he had claimed a right of retainer. Also, before his death three orders had been made in the action,

(1) Prec. in Ch. 179.

allowing the proof of various parts of the debt which he claimed, and one of those orders was expressly made without prejudice to his right of retainer. The question was how the right of retainer was to be worked out, consistently with the provisions of *Hinde Palmer's Act* (32 & 33 Vict. c. 46), s. 1.

Warmington, Q.C., and *R. F. Norton*, for the Plaintiff:—

An executor's right of retainer has not been abolished by *Hinde Palmer's Act* (1), but it has not been enlarged so as to enable the executor to retain his debt as against a creditor of higher degree. If he is only a simple contract creditor he cannot retain as against a specialty creditor: *Crowder* v. *Stewart* (2).

[*Renshaw*, for the executors of the deceased executor:—We only claim to retain as against the creditors of equal degree.]

Then the question is, how is effect to be given to the right of retainer consistently with the provisions of the Act, that the assets are to be administered equally between the specialty and the simple contract creditors?

[PEARSON, J.:—The specialty creditor must have his dividend in full; and the simple contract creditors cannot take any dividend until the executor's debt has been paid in full.]

A question may arise whether the executors of a deceased executor, who was not the survivor of the executors of the original testator, have any right of retainer; but if the Plaintiff gets his dividend in full this question does not concern him.

Renshaw, for the executors of the deceased executor:—

There being no one here to represent the simple contract

(1) Sect. 1 provides that "In the administration of the estate of every person who shall die on or after the 1st of January, 1870, no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding: Provided always, that this Act shall not prejudice or affect any lien, charge, or other security which any creditor may hold or be entitled to for the payment of his debt."

(2) 16 Ch. D. 368.

PEARSON, J. creditors, it is my duty to state to the Court that there appears to be some conflict in the authorities on the question whether the executors of an executor of the original testator have any right of retainer against the assets of the original testator, when the deceased executor was not the survivor of the executors of the original testator, and his executors, therefore, do not represent the original testator. In *Hopton* v. *Dryden* (1) it was held that in such a case there was no right of retainer. But in the present case the fact that the deceased executor claimed the right of retainer in his lifetime makes a difference. In such case his executors have a right of retainer, though they do not represent the original testator: *Ram* on Assets (2).

1883

WILSON v. COXWELL.

PEARSON, J.:—

I think that the present case is distinguishable from *Hopton* v. *Dryden*, and that there is a right of retainer, the deceased executor having claimed it during his lifetime. The order will be first to pay the costs. Then apportion the remaining assets among all the creditors (including the Plaintiff) on the footing of giving them all an equal dividend. The dividend will then be paid to the Plaintiff in full, and the executors of the deceased executor must be paid their debt out of the residue, and the surplus (if any) will be divided equally among the other simple contract creditors.

Solicitors for Plaintiff: *Oehme & Summerhays.*
Solicitors for Defendants: *Roberts & Barlow.*

(1) Prec. in Ch. 179. (2) Pages 344, 345.

W. L. C.

CHARLES *v.* FINCHLEY LOCAL BOARD.

PEARSON, J.

1883

April 26, 27; *May* 3, 8.

[1882 C. 5082.]

Nuisance—Right to compel an Action against Third Party—Power of Local Board to stop Nuisance—Public Health Act, 1875, *s.* 21.

On a motion for an injunction to restrain a local board from allowing sewage to flow into a brook opposite the Plaintiff's house, whereby a nuisance was occasioned, it appeared that the nuisance was in fact caused by *C. P.*, not a party to the action who had passed the sewage of his house into the brook through a pipe, which by agreement with the Defendants, he was only entitled to use for surface or rain water :—

Held, that although the Local Board could not be compelled to construct an improved system of drainage except by mandamus; nor to bring an action for an injunction against a third party, particularly in cases where the legal right was doubtful; still where the third party was acting in violation of an agreement entered into with the Local Board to pass surface water only through the pipe, and where no special inconvenience would be caused to other neighbours, the Plaintiff was entitled to an injunction against the Defendants on the ground that they could themselves prevent any nuisance being caused, by stopping up the pipe which was being used in contravention of the agreement, under the powers given them by the *Public Health Act*, and this, notwithstanding that they would be preventing the third party from exercising his right of passing surface water only through the pipe.

Attorney-General v. *Guardians of Poor of Union of Dorking* (1) distinguished.

PETER CHARLES, the Plaintiff in this action, was the owner of a house in *Hendon Lane*, *Finchley*, called *Older's Hill Lodge*. In the front of his house was a public footway, and to the north of the footway ran a ditch, which was originally an open ditch, but was now partly covered over. The Plaintiff complained that the Defendants, the *Finchley* Local Board, were passing or allowing to pass sewage water into the ditch, which had from time immemorial been used as a watercourse for rain or surface water only, and by so doing they had created so great a nuisance to the Plaintiff and his family that illness had been caused thereby, and he now moved for an injunction to restrain the Defendants, their servants and agents, from allowing any overflow pipe to drain from the cesspool situate in the grounds of No. 21,

(1) 20 Ch. D. 595.

PEARSON, J. 1883 CHARLES v. FINCHLEY LOCAL BOARD.

Hendon Lane, in the district of the Defendants, to pass through or under *Hendon Lane* aforesaid (which was vested in the Defendants), into the surface or rainwater pipe underneath the said lane, and which drain pipe discharged itself into the brook or watercourse in the same district, so as to cause a nuisance to the Plaintiff; or otherwise from discharging, or causing or permitting to be discharged, sewage or other offensive matter into the said brook or watercourse so as to cause a nuisance to the Plaintiff.

The facts which appeared in evidence were, that in July, 1878, the Board of Surveyors of *Finchley*, being then the highway authority of the district, entered into an agreement with *Henry Cooper*, a builder, who had obtained a lease of land on the east side of *Hendon Lane*, whereby, in consideration of *H. Cooper* giving to the parish a strip of land along the side of *Hendon Lane* to widen the road, and of supplying pipes for the efficient drainage of the road, the Board agreed to make up the road and pathway, and to lay the pipes and gullies, &c., for the proper drainage of the same, and it was agreed that *H. Cooper* should have liberty to lay down pipes from the houses he was about to erect for the purpose of carrying the surface-water from his land into the aforesaid brook or watercourse, and thence into the river *Brent*.

The *Finchley* Local Board came into existence in September, 1878, and thereupon the sewers, ditches, roads, and footpaths in the district became vested in that Board, who were the Defendants in this action. In October, 1878, *Henry Cooper* laid the foundation for the houses intended to be erected on the land so leased by him, and the surface drainage of these houses was by means of a drain constructed so as to have no communication with any sewer. None of these houses were inhabited until Midsummer, 1882, but at that period one house (No. 21), became inhabited, and since then it had been ascertained that a pipe had been laid down by which the sewage from a cesspool attached to the house No. 21 was allowed to pass down into the beforementioned ditch or watercourse, passing in front of the Plaintiff's house, and this was the ground of the present complaint.

The existence of the nuisance was admitted.

Cozens-Hardy, Q.C., and *Farwell*, for the Plaintiff:—

There can be no doubt in this case that a nuisance does exist, but the question really is whether we have a right of action against the Defendants, the Local Board. The facts are simply these: that *H. Cooper* having obtained this land close to the Plaintiff's house, and having decided upon building five houses thereon, entered into an agreement with the then existing Sanitary Board by which he was allowed to lay down pipes for carrying off the surface water into this ditch which runs in front of the Plaintiff's house; but the terms of the agreement have in fact been transgressed, and *Cooper* instead of using the pipes only for carrying off pure water has connected the pipes with the sewers of his house, so that the water in the ditch is polluted with this sewage, and it has become offensive and injurious to the health of the Plaintiff's family. We contend that it is for the Local Board, who are now in the position of the former Sanitary Board, to remedy this nuisance, and it is not for the Plaintiff to seek out the transgressor and to bring actions against persons who are wrongdoers against the Defendants as well as the Plaintiff. The Defendants are bound to protect the public from injury, and it is for them to put a stop to the nuisance which they are allowing another person to create.

Cookson, Q.C., and *W. Fooks*, for the Defendants:—

We contend that it is against *Cooper* that the Plaintiff should bring this action. The Defendants have done no wrong in the matter, and are not to blame if *Cooper* has surreptitiously made a connection between the sewers of his house and the surface drain. The Board cannot prevent the nuisance without stopping the surface drains from *Cooper's* house and from all the houses above the Plaintiff's. There is a prescriptive right in the inhabitants to use this ditch for surface drainage, and what *Cooper* is now doing cannot be stopped without interfering with those rights of other people. It was held in the case of *Glossop* v. *Heston and Isleworth Local Board* (1), that assuming an actionable nuisance existed the plaintiffs had no cause of action against the defendants, who had done no act themselves to create or increase the nuisance;

(1) 12 Ch. D. 102.

PEARSON, J. 1883 CHARLES v. FINCHLEY LOCAL BOARD.

and in *Attorney-General* v. *Guardians of Poor of the Union of Dorking* (1), the Court of Appeal decided that the sanitary authority could not stop the flow of sewage on account of the damage it would cause to other inhabitants; and it was there held also that an action could not be maintained to compel a person to bring an action against his neighbour for the purpose of restraining a nuisance. Then, again, where a Sanitary Board have not themselves constructed the sewers, but only permitted them to be used as formerly by the inhabitants, they are not doing an act which can be restrained under the *Public Health Acts*. If they neglect to provide a proper scheme of drainage for the neighbourhood then the remedy would be by mandamus. That is decided in *Glossop's Case* (2). In this case the Defendants are in fact doing their utmost to provide a better system of drainage, but hitherto they have met with difficulties which have delayed the execution of their plans. At any rate, the Court would not grant a mandatory injunction in a case like this, because to do so would cause serious inconvenience to the district, and because it is doubtful whether a Local Board have power to stop up drains which they have once authorized to be connected with their sewers: *Attorney-General* v. *Acton Local Board* (3).

PEARSON, J.:—

The substance of this motion is to restrain the Defendants, who are the *Finchley* Local Board, from allowing sewage to pass down the covered pipe into the open drain or ditch in front of the Plaintiff's house.

The facts in evidence before me are these: The public footway in front of *Older's Hill Lodge* runs into what is called *Hendon Lane*, which is to the south-east of Mr. *Charles'* house. It appears that in the year 1878 a certain Mr. *Cooper*, being, as I gather, the owner of land, or at all events being the lessee of land, on the south-east of *Hendon Lane* and in part of *Hendon Lane*, agreed with the authority, which was then the Sanitary Board, that the drain in *Hendon Lane* should be covered, he providing pipes for the purpose, and that by those pipes it should

(1) 20 Ch. D. 595. (2) 12 Ch. D. 102.
(3) 22 Ch. D. 221.

be carried across *Hendon Lane* and connected with the ditch running in front of the Plaintiff's house, and that *Hendon Lane* should be widened. Upon a reference to the agreement I find it to have been entered into in February, 1878. The Sanitary Board continued in existence only till September, 1878, and then were succeeded by the present Defendants, the *Finchley* Local Board. The agreement, as I understand it, was this, and this was the agreement acted on—that there should be a pipe from the premises, including 21, *Hendon Lane*, to drain the surface-water from that property communicating with this covered channel which was put down by the Board, and at the time when Mr. *Cooper* made that proposal, which was accepted, Mr. *Cooper's* plans shewed a covered cesspool on the property of 21, *Hendon Lane*, into which, as I understand it, not only No. 21 was to drain but other houses intended to be built by Mr. *Cooper*.

That was the arrangement undoubtedly that was made, and originally the pipe communicating from No. 21 to the covered channel was a pipe that conveyed merely surface water. But in process of time Mr. *Cooper* found the arrangements with regard to his cesspool were not convenient, and accordingly (and this is undoubtedly stated on both sides) without the leave or license of the Defendants he laid down a pipe from the cesspool to the pipe communicating with the channel, as I would call it, of the Defendants, thereby carrying from the cesspool into the pipe which had formerly conveyed only pure water, the overflow of the sewage from the cesspool. It is this overflow of the sewage from the cesspool which creates the nuisance now complained of.

Mr. *Charles*, the Plaintiff, has brought his action against the *Finchley* Local Board, who are the only Defendants, not making Mr. *Cooper* a Defendant, and he seeks to restrain the Local Board in effect from allowing Mr. *Cooper* to continue to drain the sewage from the cesspool into this channel, and so bring it down to the ditch in front of his house. The question I have to determine is whether or not Mr. *Charles* is right in bringing his action against the *Finchley* Local Board, whether this Court has any jurisdiction over the *Finchley* Local Board in such a matter as this, and whether or not, as has been contended, Mr. *Charles'* proper course would not have been to bring an action against

PEARSON, J. 1883 CHARLES v. FINCHLEY LOCAL BOARD.

Mr. *Cooper*, who is said to be the offender. I use Mr. *Cooper's* name as the person responsible for this whether he be owner or occupier. The *Finchley* Local Board say we are entirely passive in the matter, we are simply the owners of a channel which existed long ago, we are doing no wrong; if any person is doing wrong it is Mr. *Cooper*, and against him you ought to proceed.

Now, first of all, this case is said to be exactly like the case of *Glossop* v. *Heston and Isleworth Local Board* (1), which I will call for shortness *Glossop's Case*, and it is said that really and truly the object of this action is not to restrain the Defendants from allowing sewage to pass down the channel, but to compel the *Finchley* Local Board to exercise their powers and to make a new system of drainage for *Finchley*. If that were so I should be bound by the decision in *Glossop's Case*, and the decision in the *Attorney-General* v. *Guardians of Poor of Union of Dorking* (2), and I should have nothing to do but simply to say that this case is exactly on all fours with those cases, and that I must refuse this motion with costs. Now let us see what *Glossop's Case* was. *Glossop's Case*, as I understand it, was this. There was an old system of drainage, under which a certain river called the river *Crane* had been for a long time polluted, and was being polluted, and there was no doubt that that system of drainage then in existence was a nuisance to the plaintiff in that action. Shortly after the *Isleworth* Board came into power, the plaintiff complained to them of the nuisance he suffered from the existing system of drainage. They admitted the nuisance, and said they would take steps to remedy it. Mr. *Glossop* thought they were slow in proceeding, and he thereupon brought an action against them for the abatement of the nuisance of which he complained. The Court held that the Board had done nothing, that they had merely come into existence and found a system of drainage there which was bad, that it was therefore within their powers, and would be within their duty, to remedy it by devising a new scheme of drainage, but that if they were to be complained of for not putting their powers in force an injunction was not the proper remedy for that, but a mandamus was the proper course, and that inasmuch as they could not possibly grant an injunction, and as, under the

(1) 12 Ch. D. 102. (2) 20 Ch. D. 595.

circumstances of the case, they would not have granted a mandamus, for the Board had not been in existence a sufficient time to enable them to perfect a new system of drainage, there was nothing left but to dismiss the action. When the *Dorking Case* (1) came before the Court of Appeal, the late Master of the Rolls said they could find no distinction between that case and *Glossop's Case* (2), but there is a great deal said in the *Dorking Case* which has a bearing on this case, and to which I must therefore refer. What was complained of in the *Dorking Case* was this, that not only had the Board kept alive the former system of drainage, but that they had allowed persons who had no right, to drain into the old system of drainage, and thereby to increase the nuisance which had been created before. What the Master of the Rolls said in his judgment was this, that as far as he could see the only right the Board would have if they had any right at all would be to bring a series of actions against the persons who were so putting in this sewage without, as was alleged, any right, and to take their chance of succeeding or being beaten in those actions. He said that in many cases, no doubt, the persons proceeded against might have claimed prescriptive rights, and it was very doubtful whether if the Board had brought actions they would have succeeded, but he said that he knew of no case in which an injunction had been granted to compel another person to bring an action for an injunction, and he says this (3): "Independently of that did any one ever hear of an action against a man because he did not bring an action against his neighbour? It is impossible to suppose that any such action could be maintained. It comes to this, if you could maintain it you would get an injunction against a man for not bringing an injunction action against his neighbour. That is the result of it. As it is the only means he has of preventing the nuisance, it comes to an order that he shall bring an action for an injunction against all his neighbours who are sending down sewage without a prescriptive right into the sewer. That is, he would have to fight in every case the question of prescription, and acquiescence, and probably other questions which might arise. How can we tell in the absence of the people

(1) 20 Ch. D. 595. (2) 12 Ch. D. 102.
(3) 20 Ch. D. 605.

PEARSON, J. 1883 CHARLES v. FINCHLEY LOCAL BOARD.

what the case might be? He may have lost his right by acquiescence or in various other ways. No such action has ever been heard of at Common Law, and I am sure no such action has ever been heard of in Equity, where a person cannot physically put an end to the nuisance, where he can only put an end to it, if at all, by bringing an action for an injunction, and I am satisfied that no action at Common Law lies." Therefore, as I gather from the Master of the Rolls, with whom the other members of the Court agreed, he says you cannot get an injunction if the person of whom you complain can only remedy the nuisance by himself bringing another action. But he does not say you cannot get an injunction if the person of whom you complain can physically put an end to the nuisance himself. Therefore, as it seems to me, the question I really have to determine in this case is—are or are not the *Finchley* Local Board doing or allowing to be done that which is a nuisance and which they can themselves physically put an end to without any action at all; because if so, then I conceive the Court ought to grant an injunction to restrain them from committing a nuisance which they do of their own accord permit, seeing that they can at any time physically put an end to it. The question is, therefore, have or have not the *Finchley* Local Board the right to stop the passage of this sewer from the cesspool into their channel which up to the time when Mr. *Cooper* made the junction did not pass sewage down in front of Mr. *Charles*' house.

First of all it is plain upon the evidence of the Defendants' themselves that no right whatever was given to Mr. *Cooper*, except the right to pass pure water down the pipe into the channel. That, I think, I may take as a fact about which there is no dispute. But then it is said that inasmuch as that right was given to him, if he has made the connection between his cesspool and the pipe, bringing the surface water from his own property into the channel, you have no right to prevent his bringing the sewage into the channel, because you cannot do so without stopping that right which he has of bringing the pure water into the channel. That right has been given him, and it is said you cannot interfere with that right, and if you want to prevent Mr. *Cooper* bringing the sewage from the cesspool into

the channel, you must proceed against Mr. *Cooper* himself, and the Local Board are without remedy against him except by an action. Is that so? I stated my doubts as to that law when Mr. *Cookson* was arguing, and I am glad to find, on the authority of Baron *Alderson*, that my doubts are right. I am quoting from a very well-known text-book, *Addison* on Torts, the last edition, edited by Mr. Justice *Cave*, a book of so much authority that I have thought myself justified in taking the law as quoted there, without referring to the reports from which it came, which unfortunately I do not possess. It is laid down in these words (1): "Where a person who is entitled to a limited right exercises it in excess so as to produce a nuisance, and the nuisance cannot be abated without obstructing the enjoyment of the right altogether, the exercise of the right may be entirely stopped, until means have been taken to reduce it within its proper limits. 'Thus if a man,' says Baron *Alderson*, 'has a right to send clean water through my drain, and chooses to send dirty water, every particle of the water may be stopped, because it is dirty.'"

I conceive, therefore, that inasmuch as Mr. *Cooper* had merely a right to send surface water through the pipe into the channel, and is now sending that surface water mixed with sewage, independently of statute at all, the *Finchley* Local Board have a perfect right to stop the communication between that surface water pipe and their own channel until such time as Mr. *Cooper* shall restore things as they were, and cut off the overflow from the cesspool into that pipe. But, independently of that, I hold they have also the right under the statute, because the 21st section of the *Public Health Act* of 1875, says this: "Any person causing a drain to empty into a sewer of a local authority without complying with the provisions of this section shall be liable to a penalty not exceeding £20, and the local authority may close any communication between a drain and sewer made in contravention of this section, and may recover" penalties and so forth. Therefore they may abate the nuisance so caused. Now there is an overflow pipe made from this cesspool, and made into the pipe conveying the surface water into the channel belonging to the *Finchley* Local Board. It was argued before me that this section

(1) 5th Ed. p. 366.

PEARSON, J. 1883 CHARLES v. FINCHLEY LOCAL BOARD.

does not apply. It was said in the first place that this is not a drain which communicates from a building, because the drain is cut into by the cesspool; one part is on the one side of the cesspool, and the other part on the other side, and it is said that the drain does not communicate from the building with the channel. I hold that the severance of a drain into two parts, and putting the cesspool between them, does not alter the fact of its being a drain communicating from the building.

But then it is said it does not communicate with the channel, but it communicates with Mr. *Cooper's* own pipe; but inasmuch as Mr. *Cooper's* own water-pipe communicates with the channel, I hold this does communicate with the channel, and that they have a perfect right to say, You have now turned your water-pipe which does communicate with the channel into that which it was not before, namely, a drain for sewage from the house; and it matters not whether you have made the communication, or altered the purpose for which it was made, you have done it without our consent, and we are entitled to abate it. That being so, I come to the conclusion that both at Common Law and by statute the *Finchley* Local Board are entitled to abate this nuisance without asking any leave, without bringing any action, or taking any other proceedings against Mr. *Cooper*, and if that be so, I think I am justified in saying that this is a case in which the *Finchley* Local Board can physically, on their own premises, stop the nuisance which is complained of, and that they ought to do so.

Then it was said, and I was referred to a case before Mr. Justice *Fry*, of the *Attorney-General* v. *Acton Local Board* (1), that it would be very dangerous indeed to stop this, because I should be stopping the drainage from several houses, and if I did that I should create a far worse evil than the evil I was trying to remedy. Now what I find Mr. Justice *Fry* said in that case was this (2): "But in the present case to grant the injunction asked for, would involve most serious consequences. It would require the defendant to stops up all the drains or sewers which have been made from houses in *Acton* since November, 1876. Those houses, according to the evidence before me, are very numerous, and on the balance of convenience and inconvenience, bearing in mind

(1) 22 Ch. D. 221. (2) 22 Ch. D. 232.

also that no substantial damage is shewn to have accrued to the plaintiffs, I think I should be doing wrong in granting such an injunction." In this case there are at the present moment not more than two houses that are occupied. It cannot be said, therefore, that I should be doing any serious injury if I stopped up the sewage from those houses, especially if I were to give time so as to enable Mr. *Cooper* to provide another overflow for his cesspool. If I were not to do this, the Plaintiff would be without any remedy if many more houses should be built in *Hendon Lane*, and, without any express assent on the part of the *Finchley* Local Board, they were to allow every one of those houses to communicate with the channel and turn the sewage into the channel and bring it all down in front of Mr. *Charles'* house. I cannot think the law is so, or that I should be doing any wrong in a case of this kind in saying that the Local Board, inasmuch as they have power, without bringing any action, to stop the nuisance which is complained of, and which they tell me is a nuisance created without their leave and license, must take steps to prevent Mr. *Cooper*, or the occupier of any other house, from sending the sewage down this channel.

In addition to that it is said that the Defendants have no right to stop up the drain, and this was cited to me from Mr. Justice *Fry's* judgment (1): "Moreover I am by no means clear that the defendants have power to stop up a drain the construction of which they have once authorized or directed. I observe that the Master of the Rolls expressed that view in *Attorney-General* v. *Guardians of Poor of Union of Dorking* (2). Therefore on that ground also I should hesitate very long before I granted the mandatory injunction which is asked for."

I am fortunately not at all impeded in what I propose to do by that observation, to which I attach the greatest weight, and I do not hesitate to say that if the facts here were such as they were before Mr. Justice *Fry*, namely, that the communication had been made with the leave and license of the Board, I should have followed the doubts expressed by the Master of the Rolls, and concurred in by Mr. Justice *Fry*, most readily, and should have refused to grant an injunction. But the case I have is one in

(1) 22 Ch. D. 232. (2) 20 Ch. D. 595.

PEARSON, J. 1883 CHARLES v. FINCHLEY LOCAL BOARD.

which no leave or license has been granted, in which what is being done is in defiance of the Board, and in opposition to the plans proposed by Mr. *Cooper*, which shewed no connection between the cesspool and the service water pipe. I must therefore grant the injunction, though I am not sure that the notice of motion is exactly in the proper form.

After some discussion the order was finally made in the terms of the latter part of the motion—that the Defendants be restrained from discharging, or causing or permitting to be discharged, sewage or other offensive matter into the brook or water-course so as to cause a nuisance to the Plaintiff. The Defendants were given two months' time for carrying out the order, and the costs were made costs in the action.

Solicitors for Plaintiff: *Stokes, Saunders, & Stokes.*
Solicitors for Defendants: *Stevens & Co.*

T. W. G.

END OF VOL. XXIII.